Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SUNDANCE HOMES, INC., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

COUNTY OF DU PAGE, body corporate and politic, JOHN LOTUS NOVAK, Treasurer, GEORGE KOUBA, Finance Director, DONALD ZEILENGA, Director of Transportation, FIFIELD COMPANIES, INC., CAMBRIDGE HOMES, INC., CAMBRIDGE PROPERTIES, LEXINGTON HOMES, L.L.C., PRENTISS PROPERTIES ACQUISITION PARTNERS, L.P., KINGSPORT DEVELOPMENT, INC., STRATEGIC REALTY ADVISORS, INC., CATELLUS DEVELOPMENT CORPORATION, PLITT THEATERS, INC. and TOYS "R" US, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A. WHETHER THE ILLINOIS SUPREME COURT'S DECISION, WHICH ALLOWS ILLINOIS' TAXING BODIES TO KEEP MONEY PAID UNDER AN ILLINOIS STATUTE AND COUNTY ORDINANCES WHICH WERE DECLARED TO BE UNCONSTITUTIONAL, IS AN UNCONSTITUTIONAL TAKING OF THE TAXPAYERS' MONEY IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings before the Illinois Supreme Court appear in the caption of the case.

There is no parent company of Sundance Homes, Inc., nor is there a publicly held company that owns ten (10%) percent or more of the corporate stock of Sundance Homes, Inc.

Fifield Companies, Inc., Cambridge Homes, Inc., Cambridge Properties, Lexington Homes, L.L.C., Prentiss Properties Acquisition Partners, L.P., Kingsport Development, Inc., Strategic Realty Advisors, Inc., Catellus Development Corporation, Plitt Theaters, Inc. and Toys "R" Us, Inc., who are listed as Respondents in the caption set forth on the cover page of this Petition for Writ of Certiorari were Intervenors/Petitioners in the Illinois Supreme Court.

The County of Du Page, body corporate and politic, John Lotus Novak, Treasurer, George Kouba, Finance Director, Donald Zeilenga, Director of Transportation were Defendants/Respondents in the proceedings before the Illinois Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Sundance Homes, Inc., individually and as the class representative of a class of taxpayers who paid transportation impact fees under an Illinois statute, and corresponding DuPage County ordinances, which were declared to be unconstitutional by the Illinois Supreme Court, respectfully requests that a Writ of Certiorari be issued to review the decision of the Illinois Supreme Court which denied the Class' action for a refund of the impact fees paid under the said unconstitutional statute and ordinances.

OPINIONS BELOW

The opinion of the Illinois Supreme Court, to which this Petition is filed, is reported at 195 Ill. 2d 257, 746 N.E. 2d 754 (2001). (Appendix A, App. 1-37). The opinion of the Illinois Supreme Court, denying the Petition for Rehearing is included in the Appendix (Appendix G, App. 74). The opinion of the Appellate Court of the Second District of Illinois, from which the appeal to the Illinois Supreme Court was taken, is an unreported decision pursuant to Illinois Supreme Court Rule 23 (Appendix B, App. 38-60). The judgment of the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, from which the appeal originated, and which ordered that the County of Du Page refund the subject impact fees, is set forth in the Appendix (Appendix E, App. 67).

STATEMENT OF JURISDICTION

The decision of the Illinois Supreme Court was entered on February 16, 2001 (Appendix G, App. 1-37). A timely Petition for Rehearing was denied on April 2, 2001. (Appendix G, App. 74)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

I. The Fifth Amendment Due Process Clause provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. Amendment V

II. The Fourteenth Amendment Full Faith and Credit Clause, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amendment XIV

STATEMENT OF THE CASE

I. Nature of the Case.

This case involves a class action for the refund of highway transportation impact fees which were paid by numerous property owners to the County of Du Page, Illinois. The impact fees were paid pursuant to an Illinois statute, and corresponding Du Page County revenue ordinances, which were declared to be unconstitutional by the Illinois Supreme Court which declared the revenue statute and ordinances to be unconstitutional in a separate lawsuit which was brought by nine (9) home builders, none of whom were parties to the proceedings from which this Petition is being filed.

After the Illinois Supreme Court rendered its decision, and declared the subject Illinois statute and DuPage County ordinances to be unconstitutional, Sundance Homes, Inc. filed a class action for a refund of the impact fees paid by itself and all those property owners who paid said fees under said enactments. The Trial Court certified the Class and ordered that the County refund the impact fees to those who had paid them. The County

refused to refund the fees on the basis that the Class' claim for a refund was barred by the Illinois general statute of limitations period, which is five (5) years. The County argued that the five (5) year period commenced to run from the time each taxpayer paid his or her impact fee and not from the date the Illinois Supreme Court declared the subject statute and ordinances to be unconstitutional. The Class argued that an action for the refund of monies taken under an unconstitutional law is governed by the laws of equity and that general statute of limitations provisions do not apply. The Class also argued that, in the event the general statute of limitations period were to apply, the time for commencing the statutory period should commence on the date the Illinois Supreme Court declared the subject statute and ordinances to be unconstitutional since the decision created the right to the refund. The Class also argued that any statute of limitations period should be tolled between the date upon which the impact fees were paid and the date the Illinois Supreme Court rendered its decision which found the statute and ordinances to be unconstitutional.

The County appealed the Trial Court's decision to the Appellate Court for the Second District of Illinois, which Court accepted the County's arguments and reversed the Trial Court's decision. The Appellate Court found that the general five (5) year statute of limitations period was applicable to the Class' claim for a refund and that the period commenced to run on the date each taxpayer paid the impact fees. The effect of the Second District Appellate Court's decision was to allow the County to retain the money which had been paid under the unconstitutional enactments and constitutes an unlawful taking of taxpayers' money without due process of law.

The Class filed a Petition for Leave to Appeal to the Illinois Supreme Court, which Court granted the Petition and accepted the case. The Illinois Supreme Court affirmed the Appellate Court's decision and found that the general five (5) year statute of limitations period was applicable to the Class' claim for a refund and that the limitations period began to run from the date each impact fee was paid rather than from the date the Illinois Supreme Court declared the subject revenue statute and ordinances to be unconstitutional.

This Petition for Writ of Certiorari is taken from the Illinois Supreme Court decision which unlawfully applied a statute of limitations restriction upon the Class of citizens' right to a refund of impact fees paid under unconstitutional revenue enactments. The Illinois Supreme Court's decision affirms an unconstitutional taking and retention of citizens' funds without due process of law and sets a dangerous restriction on the constitutional rights of the citizens of Illinois.

II. Statement of Facts

In 1998 the Illinois legislature enacted Section 5-608 of the Illinois Highway Code (*Ill. Rev. Stat.*, Ch. 121, §5/5-608) which statute provided that the State of Illinois, and local governmental units, could collect impact fees from property owners who developed, or improved, their real property. The funds were to be used to defray the costs of highway improvements which were supposedly needed because of the additional traffic generated by the property owners' development of their property. Pursuant to the authority of Section 5-608, the County of DuPage passed Ordinance Nos. ODT-016-88; ODT-21-89;

ODT-021a-89 and ODT-21B-89 which allowed the County of Du Page to impose, and collect, similar impact fees. The fees were payable to the County and were collected between November 22, 1988 and July 25, 1990. The total amount of fees collected under the subject ordinances was $6,194,056.22. The total number of parcels of real property involved were approximately 5200.

On or about June 9, 1989, the Northern Illinois Home Builder's Association, on behalf of nine (9) separate builders, brought an action to declare Sec. 5-608 of the Illinois Highway Code, and the above set forth DuPage County ordinances, to be unconstitutional on the basis that the statute and ordinances violated the taking clause of the Fifth Amendment of the United States Constitution and Section 2 of Article I of the Illinois Constitution of 1970. The Trial Court, in that case, found that the statute and ordinances were constitutional. The Northern Illinois Home Builders Assn. appealed the decision to the Appellate Court for the Second District of Illinois, which affirmed the Trial Court's decision on October 6, 1993. *Northern Illinois Home Builders Assn. v. County of DuPage*, 251 Ill. App. 3d 464, 190 Ill. Dec. 599, 621 N.E. 2d 1012 (2nd Dist. 1993). The Northern Illinois Home Builders Association then appealed the Second District Appellate Court's decision to the Illinois Supreme Court and on March 23, 1995, the Illinois Supreme Court reversed the Appellate and Trial Courts and found that Section 5-608 of the Highway Code, and the above referenced DuPage County ordinances, were unconstitutional. *Northern Illinois Home Builders Assn. v. County of DuPage*, 165 Ill. 2d 25, 208 Ill. Dec. 328, 649 N.E. 2d 384 (March 23, 1995). The Illinois Supreme Court ruled that "the monies collected thereunder should be returned." *Id.* at 35, 39; 649 N.E. 2d

at 390, 392. It should be noted that at the time the Illinois Supreme Court rendered its decision, on March 23, 1995, almost all of the impact fees paid under the subject statute and ordinances had been paid more than five years prior to the date of the decision.

. On February 8, 1996, less than one year after the Illinois Supreme Court's decision was rendered in the *Northern Illinois Home Builders Assn.* case, the Plaintiff herein, Sundance Homes, Inc., individually and on behalf of all of the property owners who paid impact fees under the above set forth unconstitutional statute and ordinances, brought this class action for a refund of all impact fees paid thereunder. The Trial Court certified the Class and granted the Class' Motion for Summary Judgment, ordering that the monies collected should be returned to the property owners who paid them. (Appendix D, App. 63 and Appendix E, App. 67).

The County of Du Page raised several defenses to the Class' action for a refund, one of which was that the five (5) year general statute of limitations provisions, set forth in the *Illinois Code of Civil Procedure* and which pertains to actions at law; namely, Section 13-205 (735 ILCS 5/13-205), should be applied to bar the Class' claim for a refund since the action was filed more than five (5) years after the fees were paid. The Class argued that an action for a refund of taxes paid under an unconstitutional law is an action for money unlawfully had and received and that it, like the other actions pled by the Class, were actions in equity to which the statute of limitations provisions cited by the County do not apply. The Class also argued that even if the five (5) year general statute of limitations provisions were applicable, the period did not

commence to run until the Illinois Supreme Court rendered its decision on March 23, 1995, which decision created the right to a refund. The Class argued that the Illinois Supreme Court's decision changed the existing law as it had been pronounced by the Second District Appellate Court in the *Northern Illinois Home Builders Assn.* appeal. The Class also argued that if a statute of limitations statute were to apply, the statute of limitations should be tolled for the time period between the payment of the impact fees and the Illinois Supreme Court's decision.

The County appealed the Trial Court's ruling which was in favor of the Class, to the Appellate Court for the Second District of Illinois, which Court reversed the Trial Court's decision and held that the general five (5) year statute of limitations provisions did apply and that the time for calculating the period commenced on the date each taxpayer paid his, or her, respective impact fee. (Appendix B, App. 53, 56).

The Class next filed a Petition for Leave to Appeal to the Illinois Supreme Court which granted the Petition and accepted the case. The case was argued on September 20, 2000; however, between that date and February 16, 2001, the date upon which the Illinois Supreme Court rendered its decision, four (4) of the seven (7) Judges who heard the case retired. Three (3) of the six (6) Judges who participated in the decision, from which this Petition for Writ of Certiorari is taken, were not present for the oral arguments.

The Illinois Supreme Court followed the reasoning of the Second District Appellate Court and held that the five (5) year general statute of limitations period applied and

that the period began to run from the date the fees were paid and not from the date the Illinois Supreme Court rendered the *Northern Illinois Home Builders Assn.* decision. The Illinois Supreme Court ruled that the County of DuPage could retain the impact fees it had collected but did not address the due process arguments raised by the Class in its appeal and raised by this Petition.

The Class first raised the Fifth Amendment Due Process argument in the appeal to the Illinois Supreme Court since it was the Appellate Court's decision, which denied the Class' right to a refund, and confirmed the taking of the Class' property without due process of law. Up to that point, the Trial Court had ordered that the fees were to be refunded.

The Class also called the Illinois Supreme Court's attention to the fact that the Illinois Home Builders Assn. decision was decided more than five (5) years after the impact fees had been paid and that the Illinois Supreme Court, in the *Northern Illinois Home Builders Assn.* case, had ordered that the monies collected under the unconstitutional statute and ordinances should be refunded.

The Class, and the Interveners, called the Illinois Supreme Court's attention to the public policy implication of the Second District Appellate Court's decision which is to encourage governmental bodies to enact unconstitutional revenue laws with some degree of assurance that, in the event the laws are ultimately determined to be unconstitutional, the governmental taxing unit would only have to refund a relatively small portion of the fees, or taxes, collected thereunder to those few individuals who had become aware of the constitutional violation during the general statute of limitations period and

had the financial ability to challenge the constitutionality of the statute. The Class also pointed out that the Second District Appellate Court's decision also encourages the government to appeal challenges to its revenue statutes through the court system so as to delay the ultimate determination of the case by the highest Court of the jurisdiction until after the general statute of limitations period has elapsed, as was the situation in this case.

III. Raising of the Constitutional Question in the State Court Proceedings.

The constitutional issue, presented by this Petition, was first raised by the Class in its appeal to the Illinois Supreme Court since, as stated hereinabove, it was the Illinois Second District Court of Appeals decision which barred the Class' right to a refund and created the taking of the Class' money without due process of law.

The constitutional issue was set forth in the Class' Petition for Leave to Appeal to the Illinois Supreme Court (Appendix I, App. 90 & 91) and in the Class' Brief to the Illinois Supreme Court. (Appendix J, pp. App. 117-118, 124, 126-127, 131-140).

The specific reference to the constitutional issue, as set forth in the Petition for Leave to Appeal to the Illinois Supreme Court, is found at Appendix I, App. 90 and 91, and is as follows:

"POINTS RELIED UPON FOR REVERSAL"

"I. THE SECOND DISTRICT'S DECISION CONSTITUTES AN UNCONSTITUTIONAL TAKING OF THE PLAINTIFF-PETITIONER CLASS' PROPERTY IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AND ALSO ENTITLES THEM TO A RIGHT OF REVIEW TO THIS COURT AS A MATTER OF RIGHT.

> Illinois Supreme Court Rule 317 provides a right of review to this Court when a constitutional question arises for the first time as a result of the action of the Appellate Court. In this case the Illinois Supreme Court, in the *Northern Illinois Home Builders Assn.* case ruled that the same statute and ordinances, under which the subject impact fees were collected, were unconstitutional and found that the payment of said fees was an unconstitutional taking under the Fifth Amendment of the United States Constitution and Section 2 of Article I of the Illinois Constitution of 1970 (Ill. Const. 1970 Art. I, §2). The Second District Court's decision, which reverses the trial court's ruling to refund the impact fees, constitutes an unconstitutional taking of the taxpayers' property as defined by the Illinois Supreme Court in the *Northern Illinois Home Builders* case. Therefore this case falls squarely within the provisions of Supreme Court Rule 317 and the Plaintiff-Petitioner Class has a right to have this matter reviewed by this Court."

The specific reference to the constitutional issue, as set forth in the Class' Brief and Argument to the Illinois Supreme Court, can be found in the Points and Authorities, in the Issues Presented for Review, in the Constitutional Provisions Involved and in the Argument

(Appendix J, App. 117-118, 124, 126-127, 131-140). The Class in its Brief and Argument asserted that the Second District Appellate Court's decision amounted to an unlawful taking of taxpayers' money without due process of law. The Class cited the basic constitutional principle that the unlawful taxation of, or the imposition of fees upon, citizens by the government is the taking of said citizens' property without due process of law. The Class cited the Illinois Supreme Court case of *Boynton v. Kusper*, 112 Ill. 2d 356, 98 Ill. Dec. 208, 494 N.E. 2d 135 (1986), for this proposition, which decision cited the United States Supreme Court case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L. Ed. 322 (1922). In the *Pennsylvania Coal Company* case, the United States Supreme Court stated that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416, 43 S.Ct. at 160.

The Class also cited the United States Supreme Court cases of *Marchetti v. U.S.*, 390 U.S. 39, 88 S.Ct. 697, 19 L. Ed. 2d 889 (1968) and *Grosso v. U.S. Coin and Currency*, 390 U.S. 62, 88 S.Ct. 709, 19 L. Ed. 2d 906 (1968), as well as the Federal Court of Appeals cases of *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972) and *Neely v. U.S.*, 546 F.2d 1059 (3rd Cir. 1976) which applied the holdings of the *Marchetti* and *Grosso* cases.

In the *Marchetti* and *Grosso* cases, the United State Supreme Court held that where a gambling conviction is procured by use of a confession which is obtained in violation of a defendant's Fifth Amendment constitutional rights, and property of the defendant is forfeited as

the result of said conviction, upon a reversal of the conviction, the government was required to return the forfeited property to the defendant. The *Marchetti* and *Grosso* cases changed the law which existed prior to their pronouncements.

The effect of the *Marchetti* and *Grosso* cases was considered by the Fifth Circuit Court of Appeals in the case of *United States v. One Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972). In that case, the defendant's automobile was forfeited in 1962 as a result of a gambling conviction. The defendant's gambling conviction was reversed because of the use of a statement which was taken in violation of the defendant's Fifth Amendment Constitutional rights. The *Marchetti* and *Grosso* decisions were rendered by the United States Supreme Court in 1968 and shortly thereafter, the defendant moved the court for the return of his automobile taken in 1962. The government argued that the defendant could not recover his vehicle, irrespective of the holding in the *Marchetti* and *Grosso* cases, because the statute of limitations period had run and that the period should be calculated from the time the property was forfeited and not from the date upon which the *Marchetti* and *Grosso* cases were decided. The Federal Court of Appeals held for the defendant and stated at p. 1358:

> "The period of limitations does not always begin on the date of the wrong. See *Cooper v. United States*, 7th Cir. 1971, 442 F.2d 908. No cause of action generally accrues until the Plaintiff has a right to enforce his cause. (Cites Omitted) The right to sue is hollow indeed until the right to succeed accompanies. Patently, appellant in the instant case had no reasonable probability of successfully prosecuting his claim

> against the government prior to the enunciation of the *Marchetti-Grosso* rule on January 29, 1968. We realize that mere ignorance of one's rights will not toll the limitations period. (Cites Omitted) This is not, however, a case in which a plaintiff is ignorant of his rights, but rather a case of a plaintiff without a right."

It is respectfully submitted that the constitutional issue was raised in a timely fashion in the Courts from which this Petition for Writ of Certiorari is taken.

REASONS FOR GRANTING THE PETITION

I. THE ILLINOIS SUPREME COURT DECISION HEREIN WHICH DEPRIVES ILLINOIS CITIZENS OF THEIR RIGHT TO A REFUND OF FEES PAID UNDER UNCONSTITUTIONAL REVENUE LAWS, IS A VIOLATION OF THE CITIZENS' DUE PROCESS RIGHTS AND HAS FAR REACHING EFFECTS ON THE CITIZENS OF ILLINOIS.

The prevailing reason why this Court should accept this case is to protect the citizens of Illinois from having their money taken by state and local taxing bodies under unconstitutional revenue legislation without having the right to recover said funds when the statute, or ordinances, under which the funds are taken is found to be unconstitutional. The Illinois Supreme Court's decision has far reaching effects beyond the claims of the numerous Class members involved in this action and the $6,194,056.22 collected by way of the subject unconstitutional laws. The Illinois Supreme Court's decision affects the rights of countless citizens whose money has already been taken under the existing revenue laws of Illinois,

which may hereafter be determined to be unconstitutional, and the rights of Illinois citizens whose money, and property, will be taken under future revenue laws which may also be determined to be unconstitutional.

This case is not simply about whether state government can set statutory procedures for contesting the payment of taxes, or fees, imposed against them. This is a case about whether a governmental unit can keep money which it has collected under an unconstitutional tax, or fee, after there has been a determination by the highest Court of review that the tax, or fee, is unconstitutional. This case is even more oppressive on the citizens' rights because the fee statute and ordinances did not contain any predeprivation or postdeprivation contest provisions.

The Illinois Supreme Court's decision, from which this Petition is filed, sets forth an inflexible and unconstitutional rule, which is to limit any right to a refund to those claims which are filed within the general five (5) year statute of limitations period as set forth in the Civil Practice Act (735 ILCS 5/13-205), irrespective of the constitutionality of the revenue law under which said tax, or fee, is paid. The Illinois Supreme Court rejected all equitable and constitutional arguments that pertain to the refund of funds taken under unconstitutional revenue laws and misinterpreted the decisions of the United States Supreme Court which have interpreted the Fifth and Fourteenth Amendment rights of citizens not to have their property taken by the government without due process of law.

The Illinois Supreme Court has acknowledged that "an unconstitutional statute confers no rights, affords no

protection, imposes no duties, and is, in legal contemplation, as inoperative as though it had never been passed". Such was the statement of the Illinois Supreme Court in the *Northern Illinois Home Builders Assn.* case, when it found that the statute and ordinances, which are the subject of this Class action were unconstitutional and ordered that the " . . . monies collected thereunder should be returned." 165 Ill. 2d at 35; 649 N.E. 2d at 390. The same rule was pronounced by the United States Supreme Court in Justices Scalia and Thomas' concurring opinion, in the case of *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760, 131 L. Ed. 2d 824, 830, 115 S.Ct. 1745, 1752 (1995) which, interestingly enough, was cited by the Illinois Supreme Court in the decision from which this Petition is being filed. Justice Scalia and Justice Thomas stated, at p. 760:

> "In fact, what a court does with regard to an unconstitutional law is simply to ignore it. It decides the case 'disregarding the [unconstitutional] law,' *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 178, 2 L. Ed. 60 (1803), (emphasis added) because a law repugnant to the Constitution is 'void and is as no law', *Ex Parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1880). Thus if a plaintiff seeks the return of an unconstitutional tax law, the Court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy."

The principal issue raised by this Petition for Writ of Certiorari is whether a person's constitutional right to a refund of monies taken under an unconstitutional revenue law can be restricted by the application of a general statute of limitations period and whether a State Supreme Court's decisions, which declares a revenue statute to be

unconstitutional, should be given full retroactive application to al. those similarly affected by the decision.

The United States Supreme Court has repeatedly held that decisions which make constitutional pronouncements are to be given retroactive application. That rule was cited in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 131 L. Ed. 2d 824, 115 S.Ct. 1745 (1995) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S.Ct. 2439 (1991), both of which cases were cited by the Illinois Supreme Court in its decision. In this case, the Illinois Supreme Court declined to give retroactive application to its prior decision which rendered the subject statute and ordinances to be unconstitutional and went out of its way to apply an inapplicable statute of limitations provision to bar the Class' right to a refund. This is contrary to the decisions of this Court and the meaning of the United States Constitution.

The Illinois Supreme Court based its decision in large part on cases and statutes which deal with the imposition of "taxes" rather than the imposition of "fees", the constitutional considerations of which are quite different. When determining the constitutionality of tax legislation the principal constitutional consideration is that of the equal protection clause; whereas, the constitutional consideration which applies to the imposition of fees is whether the fee is properly assessed under the police powers of the government.

Besides the fact that the Illinois Supreme Court based its decision on "tax", rather than "fee" case authorities, the Court also misapplied and misinterpreted the tax cases which it cited as the authority for its decision. The Illinois Supreme Court recognized, in its Opinion, that

"The original 1987 enabling act for the collection of impact fees contained no provisions specifically addressing refund claims or procedures for challenging the collection of impact fees." (Appendix A, App. 17). The Court also acknowledged that the subject impact fee statute was changed after the enactment of the statute and ordinances which are the subject of this case were enacted to add a limited "appeals process" to contest the government's right to retain the fees if the funds were not committed for highway use within a specific time period. The Court recognized that the statute in question provided no limitations period for contesting the payment of the fees imposed. (Appendix A, App. 18). Thus, there was no predeprivation or postdeprivation provision in the subject statute or ordinances to which the fee payor could refer to to determine the time within which he or she must bring a claim for a refund. The Illinois Supreme Court cited an Illinois law that went into effect on January 1, 2001, which it recognized was not applicable to the subject Class' claim for a refund as a pronouncement of the legislature's intent to limit a person's right to a refund in the event a tax law is declared unconstitutional. (Appendix A, App. 30). The recent enactment is called the "Local Government Taxpayers Bill of Rights" (Pub. Act. 91-92, effective January 1, 2001) and provides as follows:

> "No units of local government are required to refund or credit any taxes voluntarily paid without written protest at the time of payment in the event that a local government tax is declared invalidly enacted or unconstitutional by a court of competent jurisdiction." Pub. Act. 91-920, §65, eff. January 1, 2001.

It should be noted that the Illinois Supreme Court's cite of the above statutory provision, passed thirteen (13)

years after the passage of the subject impact fee statute shows the Illinois legislature's need to address this issue and confirms the fact that there was no predeprivation or postdeprivation provision in the Illinois Highway Code to which a fee payor could look to determine when and how he, or she, could contest the subject impact fee statute.

It is respectfully submitted that the reasoning of the Illinois Supreme Court is diametrically opposed to this Court's holdings in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L. Ed. 2d 74 (1992); *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L. Ed. 2d 454 (1994) and the series of cases which dealt with the retroactive application of the United States Supreme Court decisions that dealt with the return of funds taken under unconstitutional tax laws. In the *Harper* case, the Virginia Supreme Court refused to apply the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L. Ed. 2d 89 (1989), which case invalidated a Michigan income tax law that taxed retirement benefits which were paid by the Federal Government while exempting retirement benefits which were paid by the State and its political subdivisions. The Virginia Supreme Court refused to apply the United States Supreme Court's decision in the *Davis* case and to refund income taxes which had been paid prior to the holding in the *Davis* case. The United States Supreme Court reversed the Virginia Supreme Court's decision, which is similar to the Illinois Supreme Court's decision herein and held that a citizen must have predeprivation or postdeprivation opportunity to contest the payment of a tax and without such a procedure the tax does not satisfy due process.

> "If Virginia 'offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the due process clause'. *Id.* at 38, n.21, 110 S.Ct. at 2251, n.21. On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.' "

Id. at 101, 113 S.Ct. at 2519.

In the United States Supreme Court case of *Reich v. Collins*, 513 U.S. 106, 130 L. Ed. 2d 454, 115 S.Ct. 547 (1994), the Court was again faced with a similar Georgia State income tax provision that taxed Federal retirement benefits and did not tax State retirement benefits. The Georgia Supreme Court recognized that the *Davis v. Michigan Dept. of Treasury* case rendered its statute unconstitutional but affirmed the trial court's decision which applied the Georgia general five (5) year statute of limitations restriction to the case. The Georgia Supreme Court also held that since the statute was unconstitutional under the *Davis* decision, the postdeprivation contest provision therein was also invalid and held that the taxpayers were only left with the general predeprivation contest procedures which for them had expired since they had not taken advantage. The taxpayer argued that the Federal due process clause required the State of Georgia to refund all of the funds paid under the unconstitutional

taxing statute and the United States Supreme Court agreed and stated:

> " . . . As we said, these cases stand for the proposition that 'a denial by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment. . . . "

Id. at 109, 115 S.Ct. at 549.

The Court also pointed out, in the *Reich* decision, that due process requires that state taxing laws contain a "clear and certain" scheme for contesting the payment thereof, be it a predeprivation or postdeprivation procedure. *Id.* at 113, 115 S.Ct. at 551. In the case before this Court, the impact fee statute had no predeprivation or postdeprivation scheme to obtain a refund of fees paid thereunder. This is another reason that the declaration of unconstitutionality requires that the fees should be refunded.

As stated hereinabove, the Illinois Supreme Court misinterpreted the decisions of this Court and cited said decisions for propositions that supported its conclusion but were not the holdings of the cases. One such case is the *Reynoldsville Casket Co.* case, cited hereinabove. The Illinois Supreme Court cited that case for the proposition that "Federal decisions appear to sanction strict applications of statutes of limitation in the area of tax litigation, even when the law has been altered by judicial decision." (Appendix A, App. 12). The *Reynoldsville Casket Co.* does not stand for the above proposition. It also does not involve a tax litigation case but comes very close to deciding the statute of limitations issue raised by this Petition. That case involved an Ohio personal injury

statute of limitations provision which provided a different limitation period for an in-state and an out-of-state defendant. The United States Supreme Court, in a separate case, had decided that the Ohio statute violated the commerce clause of the United States Constitution. The Ohio Supreme Court, in the *Reynoldsville* case, refused to apply the United States Supreme Court's prior holding in the other case retroactively to the facts of the *Reynoldsville* case. On the appeal of the *Reynoldsville* case to the United States Supreme Court, the Court held that, under the supremacy clause, the Ohio Supreme Court was obligated to apply the prior decision which determined the statute to be unconstitutional. The case did not deal with the application of a statute of limitations to bar tax litigation relief at all. It should be noted, however, that, even though the *Reynoldsville Casket Co.* case did not involve a revenue statute, the United States Supreme Court did discuss the retroactive application of a decision that renders a revenue statute to be unconstitutional and stated:

> "Suppose a state collects taxes under a statute that this court later holds unconstitutional. Taxpayers then sue for a refund of the constitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. . . . "

Id. at 756, 115 S.Ct. at 1750.

The United States Supreme Court acknowledged that there could be procedural requirements in state law that could be considered but held that those procedural requirements would also have to satisfy constitutional safeguards and cited the case of *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S.Ct. 2238 (1989).

The Illinois Supreme Court also cited and misinterpreted the United States Supreme Court's holdings in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S.Ct. 2439 (1991); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation*, 496 U.S. 18, 110 S.Ct. 2238, 110 L. Ed. 2d 17 (1990); *Ward v. Board of County Commissioners*, 253 U.S. 17, 64 L. Ed. 751, 40 S.Ct. 419 (1920) and *United States v. Estate of Donnelly*, 397 U.S. 286, 25 L. Ed. 2d 312, 90 S.Ct. 1033 (1970).

With reference to the *James B. Beam Co.* case, the Illinois Supreme Court cited the case for the proposition that "a court decision cannot be applied retroactively to civil causes of action already barred by statutes of limitations or *res judicata*." (Appendix A, App. 13). This statement would appear to support the Illinois Supreme Court's decision if it were the holding of the case; however, the *James B. Beam* case did not involve a statute of limitations issue but only pertained to the issue of whether a court decision which declares a revenue statute to be unconstitutional, should be applied retroactively or prospectively. The United States Supreme Court held that a case decision, which declares a revenue statute to be unconstitutional, should be applied retroactively and not merely prospectively as the Georgia Supreme Court had applied it. 501 U.S. at 532, 111 S.Ct. at 2441. The United States Supreme Court did not have before it the issue of whether the retroactive application of the decision was limited by any statute of limitations period. It is respectfully submitted that the Illinois Supreme Court misinterpreted the holding of the *James B. Beam* case and that

that decision is not adverse to the Class' position but is supportive thereof.

The Illinois Supreme Court also cited the *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation* case, 496 U.S. 18, 45, 110 L. Ed. 2d 17, 110 S.Ct. 2238, 2255 (1990), for the proposition that: "The Supreme Court has repeatedly affirmed the notion that a statute of limitations may bar a tax refund action, notwithstanding the Court's ruling that the state's taxing statute is unconstitutional and irrespective of the Court's retroactive application of that ruling." (Appendix A, App. 13). The *McKesson* case did not deal with the application of a statute of limitation issue but involved the validity of a Florida liquor excise tax scheme which gave preferential tax rate advantages to Florida grown products. The United States Supreme Court held that the Florida statute was unconstitutional and remanded the case back to the Florida legislature to enact laws that would treat Florida growers and out-of-state producers equally by either refunding the unequal portion of the taxes already paid by the out-of-state producers or by imposing a higher tax on the Florida growers to equalize the inequality. There was no issue before the *McKesson* Court as to whether the retroactive application of the United States Supreme Court's decision, which declared the Florida law to be unconstitutional, was limited by any statute of limitations period. That is considerably different from the interpretation the Illinois Supreme Court has given to that decision in its Opinion.

The Illinois Supreme Court also misstated the holding in *Ward v. Board of County Commissioners*, 253 U.S. 17,

64 L. Ed. 751, 40 S.Ct. 419, 422 (1920) and cited that case for the proposition that a "refund claim could be barred if there was any valid local [limitations] law in force when the claim was filed". (Appendix A, App. 13). In the *Ward* case, the United States Supreme Court reversed the Oklahoma Supreme Court, which had denied the refund of property taxes that were paid by real estate taxpayers under an unconstitutional statute. The issue of whether an Oklahoma statute of limitations would bar the refund of said property taxes was never before the Court. With reference to the refund of the taxes paid under the unconstitutional law, the United States Supreme Court stated:

> "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State."

Id. at 24, 40 S.Ct. at 422.

The *Ward* case is also supportive of the Class' position and contrary to the holding of the Illinois Supreme Court.

In support of its decision, the Illinois Supreme Court cites the concurring opinion of Justice Harlan in *United States v. Donnelly*, 397 U.S. 286, 296, 25 L. Ed. 2d 312, 319-20, 90 S.Ct. 1033, 1039 (1970). The Illinois Supreme Court cited the concurring opinion for the proposition that a change in the law will not affect claims that have been considered and ruled upon or are barred by a statute of limitations. (Appendix A, App. 13). However, as

demonstrated below, the United States Supreme Court in *Donnelly* did not have before it the issue of whether the Court's declaration of invalidity should be limited by a statute of limitations period. In that case, the Federal government filed an income tax lien against a taxpayer's real property. The lien was filed in the Federal District Court, but was not recorded in the County Recorder of Deeds office. The lien also did not contain the legal description of the property. Under Michigan law, a tax lien was required to be filed in the County Recorder's Office and to contain a legal description. In 1960 the taxpayer, who was the subject of the tax lien, sold the property to a good faith purchaser, who was unaware of the tax lien. In 1961, in a separate case, the United States Supreme Court held that the Federal Government did not have to comply with the Michigan statutory lien requirements and that the filing of a lien in the Federal District Court was sufficient to preserve the government's lien rights in the real property against a good faith purchaser. In 1966 the government brought an action to foreclose its lien against the good faith purchaser. The Federal District and Appellate Courts both held that the government's lien was no good against the good faith purchaser and relied upon the Michigan lien filing statute. The United States Supreme Court reversed the District and Appellate Courts' decisions and cited the Federal rule of law that a tax lien could be filed in a Federal District Court. The United States Supreme Court found that the intervening Supreme Court decision rendered in 1961, which struck down the Michigan lien filing statute, did not change the law but merely clarified the existing Federal law on that point. *Id.* at 293, 90 S.Ct. at 1037. The *Donnelly* case did

not involve a change in the law or a statute of limitations restriction on the retroactive application of a case decision that declares a tax law unconstitutional. The Illinois Supreme Court's reliance on this case is misplaced.

The cases of *Marchetti v. United States*, 390 U.S. 39, 19 L. Ed. 2d 889, 88 S.Ct. 697 (1968); *Grosso v. United States Coin and Currency*, 390 U.S. 62, 19 L. Ed. 2d 906, 88 S.Ct. 708 (1968); the cases of *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972) and *Neely v. United States*, 546 F.2d 1059 (3rd Cir. 1976), cited hereinabove, also support the rule of retroactive application of constitutional decisions and are also supportive of the Class' position.

It is respectfully submitted that the citizens of Illinois have Fifth and Fourteenth Amendment constitutional rights not to be taxed, or to be assessed fees, in an unconstitutional manner. These constitutional safeguards include the right to bring an action for the refund of the taxes, or fees, fees unlawfully collected from them. To deprive the citizens of Illinois these rights is to deprive them of their property without due process of law.

It is therefore respectfully submitted that this Court should review the decision of the Illinois Supreme Court, to which this Petition for Writ of Certiorari is taken, because said decision is in clear contravention of the due process clause of the Fifth Amendment and the full faith and credit provisions of the Fourteenth Amendment of the United States Constitution and has far reaching effects on the citizens who pay taxes, or fees, under Illinois laws.

II. THE ILLINOIS SUPREME COURT'S DECISION HAS THE EFFECT OF ENCOURAGING GOVERNMENTAL TAXING BODIES TO PASS UNCONSTITUTIONAL REVENUE LEGISLATION WITH LITTLE CONCERN THAT THEY WILL HAVE TO REFUND THE MONIES COLLECTED THEREUNDER.

The Illinois Supreme Court's decision has the real and practical effect of encouraging the Illinois legislature, and local governmental units, to pass unconstitutional revenue taxes, or fees, because of the reasonable certainty that, if the tax, or fee, is later determined to be unconstitutional, the taxing body would only have to refund the monies paid by those few individuals who have the presence of mind, interest and financial ability to file an action within the five (5) years from the date they paid the same. In this case, the individuals who challenged the impact fees were nine (9) individuals out of 5200 parcels of property. If the Illinois Supreme Court's decision is allowed to remain the law of Illinois, all those individuals who would be similarly affected by a case decision which renders a tax or fee to be unconstitutional would be without remedy to receive their money back. Also, if the appeal process were delayed to consume more than five (5) years, as was the situation in this case, there would be no chance that any additional claimants could come forward.

Although the motives of those who govern may be laudable, and the public interest may be paramount in their minds, when they pass an unconstitutional tax, or fee, regardless of their motives, the imposition of said unconstitutional tax, or fee, is still wrong and violates the

Federal and State Constitutions. This Court recognized this issue in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L. Ed. 322, 326 (1922), cited hereinabove, where the Court stated that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In addition, the Illinois Supreme Court's decision encourages Illinois governmental units to prolong litigation, which involves constitutional challenges to their revenue legislation, so as to consume the full five (5) year statute of limitations period so as to reduce the number of potential claims that could be filed if there is a determination that the tax, or fee, is unconstitutional. The shorter the period between the time of the Court's resolution and the expiration of the statute of limitations period, the lesser the likelihood that other taxpayers could learn about the Court's declaration of unconstitutionality and seek a refund. This type of legal strategy is in contravention of the principles of the United States Constitution.

The Class argued to the Illinois Supreme Court, and to the lower Courts as well, that if any time limitations period should be placed upon a citizen's right to seek a refund it should be under laches considerations and that the time from which an action for a refund should be brought is the date upon which the highest court of the state, or the court to which the last appeal is taken, declares the tax, or fee, statute to be unconstitutional.

CONCLUSION

Wherefore, the Petitioner Class respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari and to review and reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX A

ILLINOIS SUPREME COURT

Docket Nos. 88763, 88764 cons. –
Agenda 21 – September 2000.

SUNDANCE HOMES, INC., *et al.*, Appellants, v.
THE COUNTY OF DUPAGE *et al.*, Appellees.

(Filed Feb. 16, 2001)

CHIEF JUSTICE HARRISON delivered the opinion of the court:

On March 23, 1995, this court rendered its opinion in *Northern Illinois Home Builders Ass'n v. County of DuPage*, 165 Ill. 2d 25 (1995) (hereinafter referred to as *NIHBA*), holding unconstitutional the first of two state enabling statutes, and DuPage County ordinances enacted pursuant thereto, which, respectively, authorized and imposed transportation impact fees on new development. In the context of that case, this court stated, "monies collected thereunder should be returned." *NIHBA*, 165 Ill. 2d at 35-36, 50. The appellants in this case, fee payers who were not parties in *NIHBA*, who waited more than five years after they had paid the impact fees in question to file for a refund, and who indeed filed almost a full year *after NIHBA* was decided, now seek, by various procedural means legal and equitable, a refund of fees they paid under the invalidated statute and ordinances. Although there are several facets to the issue, their right to a refund is the central question before the court. We set forth hereafter facts necessary to an understanding of our disposition.

In 1987, the Illinois legislature enacted former section 5-608(a) of the Illinois Highway Code (the enabling act)

(Ill. Rev. Stat. 1987, ch. 121, par. 5-608(a), repealed by Pub. Act 86-97, §2, eff. July 26, 1989). The 1987 enabling act allowed counties with populations between 400,000 and 1 million inhabitants to establish transportation impact districts and collect transportation impact fees from persons constructing new developments in those districts.

Pursuant to the enabling act, DuPage County passed several ordinances creating transportation impact districts and providing for the collection of road impact fees from builders (DuPage County Ordinances ODT-016-88, ODT-021-89, ODT-21A-89, ODT-021B-89). The plaintiff, Sundance Homes, Inc. (Sundance), is a development company which constructs new residences in DuPage County. Between November 22, 1988, and July 25, 1990, the county collected road impact fees from the plaintiff and other homebuilders. On July 26, 1989, the legislature repealed the enabling act and passed the Road Improvement Impact Fee Law (605 ILCS 5/5-901 *et seq.* (West 1992)). As a result of that legislation, the county enacted a new ordinance effective July 25, 1990, authorizing the collection of road impact fees pursuant to the new law. The instant case concerns only those impact fees collected by the county prior to July 25, 1990.

Between January 17, 1989, and July 25, 1990, plaintiff paid a total of $63,580 in road impact fees to the county. The plaintiff submitted each payment under protest. In 1988, the plaintiff and several other homebuilders filed a lawsuit against the county in the circuit court of DuPage County. Home Builders Ass'n of Greater Chicago v. County of DuPage, No. 88-MR-683 (Circuit Court of DuPage County). In that case, the plaintiff requested a declaration that the enabling act and the DuPage County

ordinances enacted pursuant thereto were unconstitutional. The plaintiff also sought the entry of an order requiring the county to refund all road impact fees paid by the plaintiff and the other named homebuilders. Although the plaintiff moved for judgment on the pleadings in that case on June 15, 1990, no judgment was ever entered on the merits and the case was voluntarily dismissed in November 1990.

The constitutionality of the enabling act of 1987, and the DuPage County implementing ordinances, was again attacked in a separate lawsuit brought by different homebuilders in *NIHBA*. As previously noted, on March 23, 1995, this court filed an opinion in *NIHBA*, holding unconstitutional the enabling act of 1987, and the DuPage County implementing ordinances, and stating that "the monies collected thereunder should be returned." *NIHBA*, 165 Ill. 2d at 35-36, 50. The appellants in the instant case were not parties in *NIHBA*.

Following this court's holding in *NIHBA*, the plaintiff requested that the county return the $63,580 in road impact fees it had paid between January 17, 1989, and July 25, 1990. The county refused the plaintiff's request for a refund.

Plaintiff filed the instant class action suit on February 8, 1996, requesting that the county be ordered to return all of the road impact fees paid between November 22, 1998, and July 25, 1990. The plaintiff alleged that, during this period, the county had collected an aggregate amount of $6,194,056.22 in impact fees from the members of the class. As subsequently amended, the plaintiff's complaint consisted of three counts. Count I was entitled

"mandamus" and sought an order requiring the county to immediately return the impact fees paid by each class member. Count II was entitled "declaratory judgment" and sought an order declaring that the county was indebted to each class member in an amount equal to the total road impact fees paid by that class member. Count III was entitled "restitution, assumpsit, unjust enrichment, and recovery of payment" and sought an order that the county be required to deposit all of the collected road impact fees into a common fund for the benefit of the members of the class.

On July 10, 1996, the county filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 1996)). In its motion, the county argued that plaintiff's complaint was time-barred by section 13-205 of the Code, which imposes a five-year limitation period on "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 1996). The county argued that the plaintiff had failed to file its complaint within five years from the date its cause of action accrued, according to the county, the date it had actually paid the road impact fees. Alternatively, the county argued that the plaintiff's complaint should be barred under the doctrine of *laches*.

In response to the motion, the plaintiff argued that its cause of action did not accrue until this court filed its opinion in *NIHBA* on March 23, 1995. The plaintiff contended that, prior to the ruling in *NIHBA*, it had no right to a refund of the impact fees. The plaintiff therefore concluded that the instant class action was a timely attempt to "enforce" this court's ruling in *NIHBA* that the monies collected pursuant to the invalidated ordinances

"be returned." On November 5, 1996, the trial court denied the county's motion to dismiss.

On March 4, 1997, the circuit court entered an order certifying as a class "[a]ll persons or entities who paid impact fees to the [County] and/or claim a refund pursuant to * * * Ordinance Nos. [ODT]-016-88; ODT-021-89; ODT-021A-89; and ODT-021B-89 during the period of the effective enforcement of said ordinance[s] which was from November 22, 1988, through July 25, 1990, which ordinance[s] w[ere] declared to be unconstitutional by the Illinois Supreme Court." The trial court also identified as a subclass those homebuyers who were entitled to a refund because their developer/builder had incorporated the charge for the road impact fees into the purchase price of their homes.

On September 22, 1997, the plaintiff filed a motion for summary judgment as to each count of its complaint. The plaintiff argued that there existed no genuine issue as to the county's obligation to return the road impact fees and as to the amount of the refund due. The plaintiff therefore concluded that it was entitled to judgment as a matter of law. On November 24, 1997, the trial court entered an order granting the motion for summary judgment. The county filed a notice of appeal from that order, but the appellate court dismissed the appeal. Sundance Homes, Inc. v. County of DuPage, No. 2-97-1232 (February 6, 1998) (unpublished order of dismissal).

On March 13, 1998, the circuit court entered an order creating a common fund for the benefit of the class and directing the DuPage County treasurer to transfer $6,194,056.22 into the fund. Also in March of 1998, the

court-approved "Notice of Class Action and Hearing on Attorneys' Fees" was sent to all ascertainable members of the class by first class mail and was published in certain newspapers. Accompanying the notice was a copy of the plaintiff's petition for attorney fees. The notice advised the class members that they could either register their claims for a refund out of the common fund or "opt-out" of the class. By the end of the registration period, class members representing claims totaling $68,000 had chosen to "opt-out" of the class. Class and subclass members representing claims totaling $2,406,745 registered to participate in the distribution of the common fund. Of those claims, there were several dual registrations by home-builders and home buyers claiming a refund to the same $37,800 in impact fees.

On September 3, 1998, the circuit court entered various orders providing that (1) the county had no standing to be heard on the plaintiff's petition for attorney fees; (2) attorney fees would be calculated based upon the entire common fund and not just the claimed portion of the fund; (3) attorney fees would be paid from the unclaimed portion of the fund; (4) an additional $37,800 would be paid out of the unclaimed fund in order to satisfy all of the dual claims; and (5) the class would receive prejudgment interest at a rate of 5% from the date the action was filed.

On June 8, 1998, Fifield Companies, Inc., Cambridge Homes, Inc., Cambridge Properties, Lexington Homes, L.L.C., Prentiss Properties Acquisition Partners, L.P., Kingsport Development, Inc., Strategic Realty Advisors, Inc., Catellus Development Corporation, Plitt Theatres, Inc., and Toys "R" Us, Inc. (collectively referred to as the

intervenors), filed motions pursuant to section 2-804(a) of the Code (735 ILCS 5/2-804(a) (West 1998)) to intervene in the class action in order to challenge the class certification and the plaintiff's petition for attorney fees. Each of these entities had paid road impact fees under the invalidated ordinances and were members of the class. Although the circuit court did not rule on the motions to intervene, the movants did participate in all aspects of the lawsuit after June 8, 1998.

On November 4, 1998, the circuit court conducted a hearing on the plaintiff's petition for attorney fees. At the hearing, plaintiff's counsel presented a detailed summary of the legal services performed on behalf of the class and the expenses incurred in prosecuting the case. Plaintiff's counsel also provided the testimony of two expert witnesses who had experience in class action litigation. Both witnesses outlined the benefits and results achieved for the class and concluded that an award of attorney fees in an amount equal to one-third of the common fund would be appropriate.

On January 15, 1999, the circuit court entered an order awarding 21.289% of the common fund as attorney fees. The common fund, including prejudgment interest, totaled $7,045,720. Applying the trial court's percentage award to the common fund resulted in a fee award of $1.5 million.

Also on January 15, 1999, the trial court entered a final dispositional order, providing that (1) $2,737,672 (claims of $2,406,745 plus prejudgment interest of $330,927) be paid out of the common fund to satisfy all of the registered claims of the class; (2) $1.5 million be paid

out of the remaining unclaimed portion of the common fund to satisfy the award of attorney fees; (3) $68,000 of the unclaimed portion of the common fund be returned to the county to satisfy the potential claims of class members who had "opted-out"; (4) $37,800 be paid out of the unclaimed portion of the common fund to satisfy all of the dual claims made by homebuilders and homeowners; (5) the remainder of the unclaimed portion of the fund be returned to the county's general fund subject to the county's reduction of its next real estate tax levy on all county taxpayers by that amount; and (6) enforcement of the order would be stayed pending an appeal.

At the time the trial court entered its final dispositional order, the intervenors renewed their request for a ruling on their still-pending motions to intervene. The intervenors sought a ruling on their motions for the express purpose of protecting their rights and interests in any appeal from the circuit court's judgment. Over the objection of the attorney representing the class, the circuit court granted the motions to intervene. The county did not object to the intervenors' motions.

Following entry of the circuit court's final dispositional order, the county filed a timely notice of appeal.

The appellate court reversed, rejecting plaintiff's assertion that the instant litigation merely represents an attempt to "enforce" this court's judgment in *NIHBA*, and holding both that the statute of limitation set forth in section 13-205 of the Code barred this action and that the doctrine of *laches* would have barred the action in any event. No. 2-99-0125 (unpublished order under Rule 23).

We subsequently allowed timely filed petitions for leave to appeal pursuant to Supreme Court Rule 315 (177 Ill. 2d R. 315), and now affirm the judgment of the appellate court. We begin our analysis with observations on the nature of time limitations applicable to legal and equitable actions by way of statutes of limitation and the equitable doctrine of *laches*, respectively, focusing specifically on refund litigation.

The purpose of a statute of limitation is to discourage the presentation of stale claims and to encourage diligence in the bringing of actions. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun* [sic] *& Bradstreet, Inc.*, 61 Ill. 2d 129, 137 (1975). Statutes of limitation and repose represent society's recognition that predictability and finality are desirable, indeed indispensable, elements of the orderly administration of justice (*Sepmeyer v. Holman*, 162 Ill. 2d 249, 256 (1994)) that must be balanced against the right of every citizen to seek redress for a legally recognized wrong. In achieving this accommodation of interests, it is first necessary to determine when a given cause of action "accrues," so as to commence the running of the relevant statutory period.

Courts of this state have held that a statute of limitation begins to run when the party to be barred has the right to invoke the aid of the court to enforce his remedy. *Milnes v. Hunt*, 311 Ill. App. 3d 977, 980 (2000); *Rohter v. Passarella*, 246 Ill. App. 3d 860, 869 (1993). Stated another way, a limitation period begins "when facts exist which authorize one party to maintain an action against another." *Davis v. Munie*, 235 Ill. 620, 622 (1908); *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 167 (1999). It has been accurately noted that a limitation

period will not await commencement until a plaintiff has *assurance* of the success of an action. *Weger v. Shell Oil Co.*, 966 F.2d 216, 219 (7th Cir. 1992) citing *Nendza v. Board of Review of the Department of Labor*, 105 Ill. App. 3d 437, 442 (1982) (discovery rule not applicable where a plaintiff waits to file suit or a claim until he has some assurance he will be successful on the merits of his claim).

Although an impact fee is not a tax (see *NIHBA*, 165 Ill. 2d at 42), the similarities between payment of a tax, and payment of an impact fee, are sufficient to render instructive tax cases addressing the issue of accrual. One such example in the federal system is the United States Supreme Court's decision in *United States v. Dalm*, 494 U.S. 596, 108 L. Ed. 2d 548, 110 S. Ct. 1361 (1990). In *Dalm*, the Supreme Court held that a federal limitation period, applicable to tax refund claims for overpayment, began to run when a taxpayer tendered payment of a tax to the government, not when the taxpayer discovered that the payment was erroneous. In so holding, the Court noted:

> "The very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar." *Dalm*, 494 U.S. at 609 n.7, 108 L. Ed. 2d at 562 n.7, 110 S. Ct. at 1369 n.7.

Limitation provisions in our state revenue statutes indicate that the time period for a claim runs from either the time a return is filed or the time the tax is paid.

Section 911(a)(1) of the Illinois Income Tax Act (35 ILCS 5/911(a)(1) (West 1998)), for example, provides as follows:

> "A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later[.]"

As section 911(a)(1) indicates, and as other tax limitation statutes discussed hereafter will show, our legislature intended, subject to established equitable "principles" of tolling, such as the appropriate application of the discovery rule, that the right to request a refund commence and terminate on dates certain. The date of accrual is generally the date that the tax is paid.

Consistent with the need for certainty and finality, it is a principle of long standing in this state that once a statute of limitation has expired, a defendant has a right to invoke the bar of the limitation period as a defense to a cause of action. *M.E.H. v. L.H.*, 177 Ill. 2d 207, 214-15 (1997). As this court recently stated in *Clay v. Kuhl*, 189 Ill. 2d 603, 609 (2000), "under Illinois law, the barring of an action by a statute of limitation creates a * * * right in favor of the defendant, and the action cannot later be revived." If, as this court stated in *Clay*, subsequent *legislative action* cannot revive a cause of action already barred by a rule of limitation, it would seem to follow that subsequent *court decisions* cannot revive a civil cause of

action not timely filed, at least in those instances where a plaintiff was fully aware of the basis for his claim, or should have been, he did not suffer from a legal disability, and the facts do not demonstrate other recognized grounds for equitable tolling.

Federal decisions appear to sanction strict application of statutes of limitation in the area of tax litigation, even where the law has been altered by judicial decision. "[L]egal principles, even when applied retroactively, do not apply to cases already closed." *Hernandez-Rodriguez v. Pasquarell,* 118 F.3d 1034, 1042 (5th Cir. 1997), citing *Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749, 758, 131 L. Ed. 2d 820, 830, 115 S. Ct. 1745, 1751 (1995). The Supreme Court in *Hyde* considered "tax examples" that presented "different, remedial problems." Considering one such example, the Court stated:

> "Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity – a rule containing certain procedural requirements for any refund suit – nonetheless barred the taxpayers' refund suit? [Citations.] Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim." *Hyde,* 514 U.S. at 756, 131 L. Ed. 2d at 828-29, 115 S. Ct. at 1750.

In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 541-42, 544, 115 L. Ed. 2d 481, 488, 492-93, 111 S. Ct. 2439, 2443, 2446-48 (1991), a tax refund case, Justice Souter, announcing the judgment of the Court, made clear that court decisions cannot be applied retroactively to civil causes already barred by statutes of limitation or *res judicata*. The Supreme Court has repeatedly affirmed the notion that a statute of limitation may bar a tax refund action, notwithstanding the Court's ruling that the state's taxing statute is unconstitutional, and irrespective of the Court's retroactive application of that ruling. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation*, 496 U.S. 18, 27, 45, 110 L. Ed. 2d 17, 29, 41, 110 S. Ct. 2238, 2245, 2254-55 (1990) (acknowledging that statutes of limitation may be dispositive in such cases); *Ward v. Board of County Commissioners*, 253 U.S. 17, 25, 64 L. Ed. 751, 759, 40 S. Ct. 419, 422 (1920) (recognizing refund claim could be barred if there was "any valid local [limitations] law in force when the claim was filed"). See also *United States v. Estate of Donnelly*, 397 U.S. 286, 296, 25 L. Ed. 2d 312, 319-20, 90 S. Ct. 1033, 1039 (1970) (Harlan, J., concurring, noting that, at some point a "transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. * * * [I]n the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*").

It would make no sense for the Court to consistently reaffirm this principle if the cause of action for a refund did not begin to run until the Court held a state taxing

statute unconstitutional. A statute of limitation would not be implicated. Clearly, the action accrues when the tax is paid.

Undoubtedly, statutes of limitation are valid procedural restrictions which may be invoked to bar an otherwise meritorious claim for a refund, even when that claim is based upon a tax statute that has been held unconstitutional. We turn now from our discussion of statutes of limitation to address the related equitable doctrine of *laches*.

This court has defined *"laches"* as "a neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity." *Meyers v. Kissner*, 149 Ill. 2d 1, 12 (1992). For *laches* to apply, a plaintiff must have knowledge of his right, yet fail to assert it in a timely manner. *Bremer v. Bremer*, 411 Ill. 454, 468 (1952). Although statutes of limitation, applicable in legal actions, are not directly controlling in suits seeking equitable relief, courts ordinarily follow statutes of limitation as convenient measures for determining the length of time that ought to operate as a bar to an equitable cause of action. *Meyers*, 149 Ill. 2d at 12. However, depending upon the particular circumstances before the court, equitable relief may be refused although the time fixed by the statute of limitations has not expired, or conversely, relief may be granted even though the limitation period has long since elapsed. *Meyers*, 149 Ill. 2d at 12.

Thus, for better or worse, depending upon one's view of the importance and continuing relevance of the

law – equity dichotomy, how we categorize various actions tends to control the limitation schemes applied to them: generally, statutes of limitation apply to actions at law; *laches* is the doctrine of limitation applied to actions in equity. Obviously, the shrewd advocate, faced with a limitation problem, will attempt to manipulate the outcome by casting his action as one in equity in order to take advantage of the amorphous quality of *laches* analysis.

However, *laches* analysis is no longer mechanically applied to all actions denominated equitable, particularly where such an application would frustrate the intent of the legislature. For example, although a constructive trust is considered to be an *equitable* remedy imposed by a court to prevent "unjust enrichment" (*In re Liquidation of Security Casualty Co.*, 127 Ill. 2d 434, 447 (1989)), this court has held the five-year statute of limitation of section 13-205 applicable to an action for constructive trusts. *Hagney v. Lopeman*, 147 Ill. 2d 458, 462 (1992); *Chicago Park District v. Kenroy, Inc.*, 78 Ill. 2d 555, 560-61 (1980). The same five-year statute of limitation has been applied to an action seeking restitution of taxes erroneously paid, based upon the same theory of "unjust enrichment," an action "at law" (*Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 527-28 (7th Cir. 1998), citing, *inter alia, Partipilo v. Hallman*, 156 Ill. App. 3d 806 (1987)) governed by "principles of equity" (*Burns*, 135 F.3d at 528, citing *Board of Highway Commissioners v. City of Bloomington*, 253 Ill. 164, 174 (1911)). In so holding, the *Burns* court commented on the "decreasingly important (and therefore increasingly hazy) line between law and equity." *Burns*, 135 F.3d at 528.

While we need not comment on the propriety of that observation, we *do* note the inclination of courts to circumscribe the reach of equity in revenue cases and the apparent intent of our legislature to impose shorter limitation periods, and thus greater certainty, in the area of tax refund litigation. The federal government, like Illinois, imposes detailed statutes of limitation on tax refund claims. Section 6511(a) of the Internal Revenue Code of 1986 requires an aggrieved taxpayer to file any claim for refund within three years from the time the tax return was filed or two years from the time the tax was paid, whichever period expires later. 26 U.S.C. §6511(a) (1994). We have previously referred to the application of that statute in our discussion of *Dalm*. We note that the same statute of limitation was at issue in *United States v. Brockamp*, 519 U.S. 347, 136 L. Ed. 2d 818, 117 S. Ct. 849 (1997), wherein the taxpayers seeking a refund argued that the statute was subject to equitable tolling for nonstatutory equitable reasons. The Supreme Court concluded that Congress did not intend the equitable tolling doctrine to apply beyond the provisions of the statute. Writing for a unanimous Court, Justice Breyer stated:

> "Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.
>
> The nature of the underlying subject matter – tax collection – underscores the linguistic point. * * * To read an 'equitable tolling' exception into §6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might

> turn out to lack sufficient equitable justification. [Citation.] The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires." *Brockamp*, 519 U.S. at 352-53, 136 L. Ed. 2d at 823-24, 117 S. Ct. at 852.

Like section 1611(a) of the Internal Revenue Code, our own state statutes of limitation, applicable to claims for tax refunds or credits, generally apply a maximum three-year limitation to such claims. See 35 ILCS 5/911(a)(1) (West 1998) (Illinois Income Tax Act); 35 ILCS 105/21 (West 1998) (Use Tax Act); 35 ILCS 115/19 (West 1998) (Service Occupation Tax Act); 35 ILCS 120/6 (West 1998) (Retailers' Occupation Tax Act); 35 ILCS 610/6 (West 1998) (Messages Tax Act); 35 ILCS 615/6 (West 1998) (Gas Revenue Tax Act); 35 ILCS 620/6 (West 1998) (Public Utilities Revenue Act); 35 ILCS 630/10 (West 1998) (Telecommunications Excise Tax Act). These statutes contain few, if any, exceptions to their terms.

The original 1987 enabling act for the collection of impact fees contained no provisions specifically addressing refund claims or procedures for challenging the collection of impact fees. However, effective July 26, 1989, the legislature enacted the Road Improvement Impact Fee Law and, with it, a very limited provision pertaining

specifically to the refund of unencumbered impact fees and a separate "appeals process" apparently intended to cover every other conceivable challenge to the collection of impact fees. Ill. Rev. Stat. 1989, ch. 121, pars. 5-916, 5-917. The former provision (now 605 ILCS 5/5-916 (West 1998)) provided as follows:

> "All impact fees collected by a unit of local government shall be refunded to the person who paid the fee or to that person's successor in interest whenever the unit of local government fails to encumber by contract impact fees collected within 5 years of the date on which such impact fees were due to be paid." Ill. Rev. Stat. 1989, ch. 121, par. 5-916.

The statute requires that the person claiming a refund file "a petition with the unit of local government imposing the impact fee, seeking a refund within one year from the date that such fees were required to be encumbered by contract." Ill. Rev. Stat. 1989, ch. 121, par. 5-916.

Section 5-916 pertains only to refunds based upon the local governmental entity's failure to encumber the fees by contract within the five-year period. All other claims would appear to fall under the umbrella of section 5-917, which contains no limitation provision of its own. Ill. Rev. Stat. 1989, ch. 121, par. 5-917. Neither section was in effect when the impact fees at issue in this case were collected; however, section 5-918 of the Road Improvement Impact Fee Law, a transition clause, *does* purport to affect funds previously collected, stating, "Nothing in this Section shall require the refund of impact fees previously collected * * * provided that such impact fees are encumbered as provided in Section 5-916." 605 ILCS 5/5-918(c) (West

1998). Section 5-918 places the onus on counties to use or lose fees collected and earmarked for road improvement under the prior enabling act and implementing ordinances.

With these observations and authorities in mind, we turn now to the specific issues raised by the appellants (plaintiff and intervenors) in this case, beginning with the appellants' suggestion that they are entitled to "enforce" this court's judgment in *NIHBA*.

A judgment has been traditionally defined as "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights *of the parties* in the lawsuit." (Emphasis added.) *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 119 (1978), citing 49 C.J.S. *Judgments* §5 (1947). Generally speaking, persons not parties are not affected by a judgment (50 C.J.S. *Judgments* §538 (1997)), they are not bound by it (*Richards v. Jefferson County, Alabama*, 517 U.S. 793, 798, 135 L. Ed. 2d 76, 83, 116 S. Ct. 1761, 1765-66 (1996)), and they may not enforce it (50 C.J.S. *Judgments* §693 (1997)).

As the county points out, the Code of Civil Procedure provides the means by which additional parties may be joined in a pending action (735 ILCS 5/2-404 (West 1998)), those interested in the outcome may intervene (735 ILCS 5/2-408 (West 1998)), and a single party may represent a class of litigants (735 ILCS 5/2-801 *et seq.* (West 1998)). Plaintiff and intervenors are obviously aware of those procedures: they have employed them. Plaintiff was evidently aware that a basis existed for challenging the constitutionality of the statute and ordinances at issue: it

did so in 1988, subsequently dismissing its action voluntarily. Although appellants take issue with the appellate court's consideration of that case as a matter not of record here, we note that a court of review may take judicial notice of prior litigation. See *In re Estate of Gebis*, 186 Ill. 2d 188, 196 (1999). The point is the plaintiff and intervenors could have joined in the *NIHBA* case; they did not. Notwithstanding their inaction, they might still have tasted the fruit of the *NIHBA* ruling first-hand had they timely filed within the statute of limitation applicable to them. *James B. Beam Distilling Co.*, 501 U.S. at 542, 115 L. Ed. 2d at 492-93, 111 S. Ct. at 2447. They did not.

This court's statement in *NIHBA* regarding the return of monies collected under the statute and ordinances evinced our view of the proper disposition of funds as between the parties then before the court, the parties over whom this court had jurisdiction. We did not state, nor did we intend to imply, that our judgment requires the County of Du Page to refund impact fees paid by nonparties.

Next, the appellants argue that their action was timely filed because their right to a refund accrued, and a refund became "recoverably certain" only upon this court's decision in *NIHBA*. Appellants, variously, support their contention that a court decision can "create" a cause of action with citations to *People v. Meyerowitz*, 61 Ill. 2d 200 (1975), *Kelly v. Chicago Park District*, 409 Ill. 91, 98 (1951), *People ex rel. Foreman v. Village of Round Lake*, 171 Ill. App. 3d 443, 456 (1988), *Neely v. United States*, 546 F.2d 1059, 1068 (3d Cir. 1976), and *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972). Although we believe the authorities we have heretofore

cited are sufficient to demonstrate the fallacy of appellants' reasoning, we will briefly address appellants' authorities which merit comment.

Appellants argue that *Kelly* supports their position insofar as the *Kelly* court held that a statute of limitation did not begin to run upon employees' salary claims, and indeed the cause of action on same did not even accrue, until the employees established their rights of employment through a separate *mandamus* action. Assuming, without addressing, the continued vitality of the holding in *Kelly*, we do not believe it applies to the facts and circumstances of the present case. It is obviously not only permissible, but desirable, to bring related claims at once in a single action. Plaintiffs in *NIHBA* joined constitutional challenges and refund claims in *their* successful lawsuit. On the basis of the authorities we have previously discussed, we reject without further comment the contention that *Kelly* controls in the context of fee or tax refund litigation.

Although we are always open to consideration of cases from other jurisdictions in order that we might glean wisdom found therein, and while federal court decisions interpreting a federal act are actually *binding* upon our Illinois courts (*Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335 (1996); *Hilst v. General Motors Corp.*, 305 Ill. App. 3d 792, 795 (1999)), we are *not* bound by those decisions insofar as their applicability is argued on issues relating solely to *state* law. *Hanrahan v. Williams*, 174 Ill. 2d 268, 277 (1996).

With respect to the federal circuit court cases upon which appellants rely, we acknowledge that they do

indeed *purport* to address accrual of an action; however, the significance that appellants accord their analysis in *this* context is misplaced. The decisions relate to the effect of subsequent changes in the decisional law on prior *criminal convictions* and ancillary fines, penalties and costs paid pursuant thereto, not collected taxes or fees and claims for refunds; they deal with *federal*, not state, statutes; and, although they couch their analyses in terms of "accrual" of an action, in substance they invoke "discovery" principles and involve retroactive application of the United States Supreme Court's decisions in *Marchetti v. United States*, 390 U.S. 39, 19 L. Ed. 2d 889, 88 S. Ct. 697 (1968), and *Grosso v. United States*, 390 U.S. 62, 19 L. Ed. 2d 906, 88 S. Ct. 709 (1968), which were accorded "full" retroactivity in *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 28 L. Ed. 2d 434, 441 91 S. Ct. 1041, 1046 (1971), to causes which had *already* accrued. It seems to us these circuit court cases unnecessarily pervert and distort concepts of accrual in order to bring their facts squarely within the realm of retroactive application.

If the cause of action had *not* already accrued, it would seem there would have been no need for the *Neely* court to state that the statute of limitation was "suspended" until the date of the *Marchetti* and *Grosso* decisions. *Neely*, 546 F.2d at 1068. Moreover, a closer reading of these cases reveals that the courts were in fact applying a discovery rule (appropriately or not) to already accrued causes, as evinced by the *Neely* court's statement that "federal courts have sometimes *postponed* the running of the limitations period in actions against the United States where the claimant did not know, and in the exercise of reasonable diligence could not learn, that a

cause of action *had* accrued." (Emphasis added.) *Neely*, 546 F.2d at 1068.

By application of the *Neely* and *Chevrolet Impala* analyses, a cause of action would not accrue on a constitutional claim until the first challenge succeeded, an event which could conceivably take place decades after final judgment was entered. This absurd analysis, which defies accepted notions of finality, is patently contrary to the reasoning of numerous federal decisions previously cited and is inconsistent with principles expressed in our own statutory schemes. It seems clear to us that accrual was really not the issue; the federal decisions upon which appellants rely were apparently grounded upon a hybrid analysis merging elements of the discovery rule and retroactive application of *Marchetti* and *Grosso*. Whatever the federal circuit courts' views may have been on those issues, we are not, as we have stated, bound by them. We address here *state* questions in the context of a *civil* case.

In *Meyerowitz*, also cited by appellants, this court considered an issue similar to those presented in the federal cases appellants have cited. Like *Neely* and *Chevrolet Impala*, *Meyerowitz* was a criminal case; unlike those cases, this court unequivocally founded its decision on principles of retroactive application. In *Meyerowitz*, with Justices Underwood and Ryan dissenting, this court accorded its decision in *People v. McCabe*, 49 Ill. 2d 338 (1971) "complete retroactive application," discussing and relying on the decisions in *Marchetti*, *Grosso*, and *United States Coin & Currency*. *Meyerowitz*, 61 Ill. 2d at 208-11. Based on the application of *McCabe*, this court held that "money, having been received in payment of fines imposed as an incident to judgments of conviction,

should be ordered refunded as an incident to the vacation of the judgments under which it was ordered paid." *Meyerowitz*, 61 Ill. 2d at 213-14. Nothing was said in *Meyerowitz* regarding the time that the defendants' actions accrued. The State did not contend that the defendants' actions were untimely; indeed, it acquiesced in the retroactive application of *McCabe* to terminate the probation of defendant Meyerowitz and to vacate the judgments of conviction of all the defendants, arguing only that *McCabe* should not be given retroactive effect to the extent of requiring refunds of fines paid as punishment for pre-*McCabe* marijuana convictions. The State essentially conceded that the actions could properly be brought by various procedural means. *Meyerowitz*, 61 Ill. 2d at 204-05. We also emphasize that the decision of this court in *Meyerowitz* was grounded upon the United States Supreme Court's decision in *United States Coin & Currency*, wherein Justice Harlan, writing for the majority, differentiated between forfeitures and fines paid pursuant to *criminal convictions* and the collection of taxes in a *civil* action. *United States Coin & Currency*, 401 U.S. at 718, 28 L. Ed. 2d at 437, 91 S. Ct. at 1043.

It is within our inherent power, as the highest court of this state, to give a decision prospective or retroactive application. *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 328 (1989). Analysis of that question in civil cases is governed by the test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971). *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 88 (1997). Different considerations apply in criminal cases. See *People v. Dean*, 175 Ill. 2d 244, 252-53 (1997). We

are concerned here, however, strictly with civil application, and certainly in that context we may "declin[e] to give [a] previous opinion retroactive effect, at least with respect to the parties * * * before the * * * court." *Aleckson*, 176 Ill. 2d at 86.

In *this* case, our analysis does not even reach that point because the statute of limitation applies and has elapsed. The sound reasoning of the United States Supreme Court in *James B. Beam Distilling Co.* expresses our view in this refund matter. As Justice Souter stated in *James B. Beam Distilling Co.*, without objection from his colleagues, "retroactivity in civil cases must be limited by the need for finality [citation omitted]; once suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed." *James B. Beam Distilling Co.*, 501 U.S. at 541, 115 L. Ed. 2d at 492, 111 S. Ct. at 2446. The door is closed in this instance.

Section 13-205 of the Code of Civil Procedure sets forth a catch-all statute of limitation for "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 1998). This court has previously acknowledged the applicability of section 13-205 to tax refund cases in which the claimants challenged a municipal sales tax, stating that aggrieved "taxpayers cannot recover disputed taxes if their suit is barred by the statute of limitations." *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 407 (1989). Section 13-205 was actually applied to an action seeking refund of impact fees in *Raintree Homes, Inc. v. Village of Kildeer*, 302 Ill. App. 3d 304, 307-08 (1999). Appellants acknowledge the holding of *Raintree*, but point out that there was no indication in that case whether the refund claim sounded in law or equity and no argument or

discussion as to which time-bar principle should apply. We could make the same observation with respect to *Ross v. City of Geneva*, 71 Ill. 2d 27 (1978), upon which appellants rely.

In *Ross*, the plaintiff class prosecuted a refund action seeking the return of fees collected, pursuant to ordinance, over a 13-year period. The fees in *Ross* were initially *hidden* and not shown on electric bills. See *Ross v. City of Geneva*, 43 Ill. App. 3d 976, 977-78 (1976). However, the ordinance imposing the surcharge *was* "publicly debated, passed and published in the local newspapers." *Ross*, 71 Ill. 2d at 37 (Underwood, J., dissenting). In any event, when the city first specified the nature of the fee, and identified it as a separate charge on a bill, the representative plaintiff immediately filed suit. In *Ross*, this court affirmed the judgment of the appellate court, which had held that the claims were not barred. *Ross*, 43 Ill. App. 3d at 985 (noting that plaintiff sought "equitable relief" by way of "the imposition of a constructive trust on, and the restitution of, funds collected without statutory authority over a period of 13 years"). The *appellate* court held that the statute of limitations did not apply to plaintiff's "equitable claim." In *Ross, this* court did not discuss or decide whether legal or equitable time-bar principles applied, apparently because defendant raised only the applicability of *laches*. See *Ross*, 71 Ill. 2d at 34. We note that this court's rather abbreviated analysis of the *laches* issue in *Ross* might as easily accommodate application of the discovery rule within the framework of a statute of limitation analysis. In essence, the majority believed that the plaintiff did not have all the relevant facts necessary for recognizing and prosecuting his claim,

and he was not remiss in failing to acquire them. Therefore, the discovery rule would have salvaged plaintiff's claim even under a statute of limitation analysis.

We are not, of course, confronted with similar facts in this case. Appellants were well aware of the character of the fee they were paying. The relevant *facts* were hardly "unknown and inherently unknowable." See *Clay*, 189 Ill. 2d at 612 (discussing application of the discovery rule). Moreover, the legal basis for a successful constitutional challenge of the statute was readily ascertainable by reference to a well-established precedent: *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 380 (1961) (applying the "specific and uniquely attributable" test). That a basis for constitutional challenge existed was readily recognized by Sundance when it filed its action (subsequently dismissed) in 1988. In short, the facts of *Ross* are not comparable to those at issue in this case.

Beyond that distinction, this court in *Ross* neither considered nor decided which of the two time-bar principles should be applied. That issue *was* decided, albeit incorrectly, by the appellate court.

In *Ross*, the appellate court appears to have rejected applicability of the statute of limitation, in favor of a *laches* analysis, at least in part because the plaintiff clothed his remedial prayer in the guise of a request for imposition of a constructive trust. As previously noted, this court *has* applied a statute of limitation to an action for constructive trust. *Hagney*, 147 Ill. 2d at 462. Why should choice of legal nomenclature dictate the result where the claim, no matter what we call it, is in essence simply a claim for refund? The potential for arbitrary and

manipulative pleading in this area is obvious from a cursory examination of Sundance's complaint, wherein theories which Sundance now *admits* are both legal and equitable are advanced in an attempt to obtain essentially the same relief, *i.e.*, return of fees paid.

In addition to counts I and II of plaintiff's complaint, which sought a writ of *mandamus* and a declaratory judgment respectively, count III of plaintiff's complaint in this case was entitled "restitution, assumpsit, unjust enrichment, and recovery of payments." These are the theories which Sundance now concedes are "at law." It would appear, therefore, to the extent that such a distinction retains significance – and under the facts and circumstances of *this* refund action we find that it retains none – at least some of the bases of plaintiff's action are ones "at law," subject to a statute of limitation.

We deem refund actions such as the one before us "civil actions," subject to the statute of limitation set forth in section 13-205 of the Code, irrespective of any artful pleading designed to cloak the cause in the attire of equity. Claimants should not be able to manipulate the result by the turn of a phrase, thereby avoiding the relevant statute of limitation which we believe the legislature meant to apply in this context.

Although we believe that the plain and unequivocal language of section 13-205 alone would render it applicable to appellants' cause of action, we find further support for that view in the more stringent statutes of limitation the legislature has seen fit to apply to tax refund litigation. As we observed in *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415 (1998), reference to another

statute by analogy is a common method of interpretation and has been relied upon by this court on many occasions. In *McNamee*, we quoted from a learned treatise on the subject:

> " 'On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships. By referring to other similar legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law.' 2B N. Singer, Sutherland on Statutory Construction §53.03, at 233 (5th ed. 1992)." *McNamee*, 181 Ill. 2d at 424.

The question here, of course, is whether the legislature intended the catch-all statute of limitation in section 13-205 to apply to a fee refund action based upon the grounds stated in plaintiff's complaint. In this respect, we note again the three-year statutes of limitation contained in the Illinois income tax (35 ILCS 5/911(a)(1) (West 1998)), the use tax (35 ILCS 105/21 (West 1998)), the service occupation tax (35 ILCS 115/19 (West 1998)), the retailer's occupation tax (35 ILCS 120/6 (West 1998)), the messages tax (35 ILCS 610/6 (West 1998)), the gas revenue tax (35 ILCS 615/6 (West 1998)), exactions on public utilities (35 ILCS 620/6 (West 1998)), and telecommunications excise taxes (35 ILCS 630/10 (West 1998)), which seem to evince a legislative intent to impose relatively short and certain limitation periods for refund actions.

Further support for this view can be found in the legislature's recent enactment of the Local Government Taxpayers' Bill of Rights (Pub. Act 91-920, eff. January 1, 2001). Although not controlling in this case, section 65 of that enactment allows local governments to impose statutes of limitation of four years or less on actions for refund of "taxes, interest, or penalties paid in error." We also note with interest the following provision:

> "No units of local government are required to refund or credit any taxes voluntarily paid without written protest at the time of payment in the event that a local government tax is declared invalidly enacted or unconstitutional by a court of competent jurisdiction." Pub. Act 91-920, §65, eff. January 1, 2001.

This provision, which seems to take account of principles espoused in cases such as *S.A.S. Co. v. Kucharski*, 53 Ill. 2d 139, 142 (1972) ("It is well settled that in the absence of fraud taxes * * * paid [voluntarily and not under duress] cannot be recovered, even though they are illegal because laid under an unconstitutional law, where there is no statute authorizing such recovery"), further evinces the legislature's intent to restrict the circumstances under which refund actions may be brought. Under this provision, those taxpayers who do not protest payment or, presumably, who do and subsequently waive their protest by failing to properly pursue their claim to conclusion (*City of Springfield v. Allphin*, 74 Ill. 2d 117, 124-25, 127 (1978)) cannot recover.

We believe the legislature intended that a uniform and harmonious system of law apply to refund cases, and the maintenance of two time-bar standards for simple

refund cases is inconsistent with that intent. Therefore, subject to the special limitation period applicable to the limited refund action allowed in section 5-916 of the Road Improvement Impact Fee Law (605 ILCS 5/5-916 (West 1998)), the five-year statute of limitation set forth in section 13-205 of the Code of Civil Procedure applies to refund actions in which the claimants essentially seek nothing more than a return of money.

We note two patently meritless arguments appellants advanced to excuse their failure to file actions in a timely manner. First, Sundance claims they would have risked the imposition of sanctions pursuant to Supreme Court Rule 137 (155 Ill. 2d R. 137) had they earlier filed an action challenging the constitutionality of the 1987 enabling act. Sundance posits that the presumption of constitutionality which a statute enjoys prohibited them from challenging the statute. Additionally, Sundance argues that once the appellate court in *Northern Illinois Home Builders Ass'n v. County of Du Page*, 251 Ill. App. 3d 494 (1993), found the 1987 enabling act and the implementing ordinances *constitutional*, fee payers were then prohibited by precedent from bringing a constitutional challenge. This contention is baseless.

The presumption of constitutionality a statute enjoys is a *feature* of litigation over that very issue. In other words, it would not be necessary to accord a statute the presumption in the absence of litigation challenging the statute in question. The party challenging the constitutionality of a statute, of course, bears the burden of rebutting this presumption and clearly establishing a constitutional violation. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 351 (1999). However, the presumption is obviously

not a prohibition against constitutional challenge. If it were, *no* statute could ever be challenged without fear of sanctions.

The preposterous nature of this proposition can be revealed by reference to the language of Rule 137 itself. Here, "good faith" is the operative term. Rule 137 allows for "good-faith argument for the extension, modification, or reversal of existing law * * * that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." 155 Ill. 2d R. 137. The purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions (*Senese v. Climatemp, Inc.*, 289 Ill. App. 3d 570, 581 (1997)), not to stifle good-faith arguments for the extension, modification, or reversal of existing law. Without such arguments, the law could not change and evolve as indeed it must. Had the Plaintiffs in *NIHBA* not made such an argument, appellants would now have no argument at all. Sundance cannot utilize Rule 137 as an excuse for its failure to timely file.

Finally, we address the intervenors' argument that it is unfair to apply a five-year statute of limitation under the circumstances because "builders, even with knowledge that certain [impact] fees are or may be illegal, are pressured into paying them in order to conduct their business, because refusal to pay the fees will have adverse consequences on the completion of the development." According to the intervenors, it would be "nothing short of fool-hearty [*sic*] for a developer to initiate litigation of any sort * * * if the builder wants to complete the development." This is so, intervenors submit, because

through the course of development the builder routinely needs various municipal approvals. Intervenors suggest that builders are justified in assuming that municipalities would retaliate, if refunds were sought, by stalling or denying necessary approvals and permits.

Ignoring for present purposes the troubling tone of intervenors' rhetoric in this respect, much of which we have chosen to omit because it is as unsubstantiated as it is vitriolic, we must express our basic disagreement with the assumption that local governmental officials, from the executive office to the local building inspector, would likely conspire to penalize fee payers who seek to assert their rights by filing actions challenging the collection of impact fees. We reject this suggestion first, because we believe it is *as* likely that officials, even those of questionable character, would respect those who display a willingness to aggressively assert their interests. Those who are to be reckoned with are unlikely to be victimized. Beyond that observation, we assume that public officials will properly perform their duties (*Moser v. Highway Commissioner,* 114 Ill. App. 3d 137, 139 (1983)), at least in the absence of evidence to the contrary. Moreover, the specter of retaliation, even if it embodies in some instances regrettable elements of substance, cannot coalesce to form the basis of a legal excuse for ignoring the statute of limitation. Myriad litigants in diverse circumstances could use the same excuse for failure to timely file actions. Who, for instance, would ever risk suing the city or village in which he lives or does business? The list of litigants who could assert this excuse might be long indeed. Intervenors cite no authority supporting their

argument on this point. We are aware of none. We reject the intervenors' argument.

Based upon the foregoing authorities, and for all the reasons stated above, we find the appellants' action barred by the five-year statute of limitation set forth in section 13-205 of the Code of Civil Procedure, and we thus affirm the judgment of the appellate court.

Affirmed.

JUSTICE GARMAN took no part in the consideration or decision of this case.

JUSTICE FREEMAN, specially concurring:

I agree with the majority that the five-year limitations period of section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 1996)) applies to this case. However, I believe that this result is best reached through a straightforward application of long-settled legal principles.

The majority opinion fails to do this. Rather, in the course of its "observations" on time limitations in legal and equitable actions, the majority opinion needlessly attacks well-established distinctions between cases at law and in equity. Slip op. at 6-14. The opinion also engages in an extended and unnecessary discussion of when actions such as these accrue. Slip op. at 7-10, 15-23. Most disturbingly, the majority opinion also implies the impropriety on the part of attorneys who invoke principles of equity. Slip op. at 11, 20-21. These discussions are not necessary to resolve this case.

Accordingly, I concur in the judgment of the court, but not in its opinion.

Count III of plaintiff's complaint, as ultimately amended, pled "restitution, assumpsit, unjust enrichment and recovery of payment." This count describes an action at law governed by principles of equity. *Board of Highway Commissioners v. City of Bloomington*, 253 Ill. 164, 173-74 (1911). The controlling principles are quite settled:

> "It is an elemental principle of law, applied in both law and equity courts, that where one person has received money or its equivalent, which belongs to another, under such circumstances that in equity and good conscience he ought not to retain it, recovery will be allowed. [Citations.]
>
> In equity, the theory of recovery is predicated on the imposition of a constructive trust, [citations] and at law, on the basis of a quasi-contract, or contract implied in law. [Citations.]" *Board of Trustees of Police Pension Fund v. Village of Glen Ellyn*, 337 Ill. App. 183, 194-95 (1949).

See generally 1 D. Dobbs, Remedies §4.2(3), at 579-82, §4.3(2), at 590-91 (2d ed. 1993). These theories of recovery are parallel. "Both quasi-contract and constructive trust aim at restitution of something that in good conscience belongs to the plaintiff." 1 D. Dobbs, Remedies §4.3(2), at 590 (2d ed. 1993).

It is equally established: "Where both a court of equity and a court of law have concurrent jurisdiction, the bar of the statute of limitations has been held to be as binding in equity as at law." *Dean v. Kellogg*, 394 Ill. 495, 504 (1946); accord *Rakstiene v. Kroulaidis*, 33 Ill. App. 3d 1067, 1072-73 (1975); 7 Ill. L. & Prac. *Chancery* §124, at 347 (1954). Specifically, courts have applied the limitations

bar of section 13-205 of the Code of Civil Procedure and its predecessor provisions to constructive trust cases sounding in equity (see, *e.g.*, *Hagney v. Lopeman*, 147 Ill. 2d 458, 462 (1992), citing *Chicago Park District v. Kenroy, Inc.*, 78 Ill. 2d 555, 560-61 (1980)), as well as to implied contract or assumpsit actions at law (see, *e.g.*, *Rohter v. Passarella*, 246 Ill. App. 3d 860, 868 (1993); *Partipilo v. Hallman*, 156 Ill. App. 3d 806, 811 (1987); see *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 527-28 (7th Cir. 1998) (applying Illinois law)). Therefore, section 13-205 of the Code applies here.

Further, it is long settled when this type of action accrues, so as to start the running of section 13-205 of the Code of Civil Procedure. "Illinois case law firmly establishes that in such actions the statute of limitations begins running when the payment is made." *Pennwalt Corp. v. Metropolitan Sanitary District of Greater Chicago*, 368 F. Supp. 972, 980 (N.D. Ill. 1973) (collecting cases); *Rath v. City of Chicago*, 207 Ill. App. 117, 121 (1917), quoting 2 A. Jacobs, Cooley on Taxation 1508 (3d ed. 1903). The present case is resolved based on settled law.

However, the majority opinion proceeds to state what the appellate court said in *Rath via* lengthy discussion of tax collection cases. Slip op. at 7-10, 15-23. Also, the majority opinion, stressing the need for certainty and finality, needlessly attacks the applicability of the equitable defense of *laches* to tax collection cases. Slip op. at 10-14. As the above-cited cases, particularly *Dean* and *Rath*, show, the majority opinion's lengthy discussion of tax cases, and especially the opinion's attack on equity jurisprudence, are unnecessary to decide this case.

Even more disturbing, the majority opinion needlessly impugns the integrity of attorneys who invoke principles sounding in equity. The majority opinion characterizes such attorneys as "shrewd" advocates, who attempt to "manipulate the outcome" of cases. Slip op. at 11. The majority opinion characterizes the pleading of equitable principles as potentially "arbitrary and manipulative." Slip op. at 20. The majority opinion exhorts: "Claimants should not be able to manipulate the result by the turn of a phrase, thereby avoiding the relevant statute of limitation * * * ." Slip op. at 21. Not only is such rhetoric unnecessary to decide this case, it impugns the integrity of attorneys who do nothing more than invoke principles of equity.

"An action for money had and received will lie whenever one person has received money which, in justice, belongs to another, and which, in justice and right, should be returned." *Wilson v. Turner,* 164 Ill. 398, 403 (1896). This court recognized that the action " 'embraces a great variety of cases.' " *Wilson,* 164 Ill. at 403, quoting, *Allen v. Stenger,* 74 Ill. 119, 121, 1874.

In providing for this action, Illinois courts long ago resolved issues that the law-equity dichotomy presents. The majority opinion's extended discussion and rhetoric does not add to that accomplishment. I concur in the judgment.

JUSTICE McMORROW joins in this special concurrence.

APPENDIX B

No. 2-99-0125

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SUNDANCE HOMES, INC., an Illinois Corporation, individually and on behalf of others similarly situated, Plaintiff-Appellee, v. THE COUNTY OF DU PAGE, a body corporate and politic; JOHN LOTUS NOVAK, Du Page County Treasurer; GEORGE KOUBA, Director of Finance; and DONALD ZEILENGA, Du Page County Directory [sic] of Transportation Defendants-Appellants.	Appeal from the Circuit Court of Du Page County. No. 96-MR-101 (Filed Nov. 22, 1999) Honorable Robert E. Byrne, Judge, Presiding.

RULE 23 ORDER

In this class action suit, the plaintiff, Sundance Homes, Inc., on behalf of itself and those similarly situated, sought a refund of $6,194,056.22 in road improvement impact fees paid to the defendant, County of Du Page (the County), between November 22, 1988, and July 25, 1990. The trial court granted summary judgment on behalf of the plaintiff and ordered the County to pay $6,194,056.22 plus prejudgment interest into a common fund for the benefit of the class. On appeal, the County argues that (1) the plaintiff's action was time-barred; (2) the trial court's judgment unjustly enriches the plaintiff and the class participants; (3) the trial court erred in awarding pre-judgment interest; (4) the trial court abused its discretion in awarding attorney fees; and (5) the trial court abused its discretion in distributing the unclaimed portion of the common fund.

BACKGROUND

In 1987, the Illinois legislature enacted former section 5-608(a) of the Illinois Highway Code (the enabling act) (Ill. Rev. Stat. 1987, ch. 121, par. 5-608(a), repealed by Pub. Act 86-97, § 2, eff. July 26, 1989). The enabling act allowed counties with populations between 400,000 and 1,000,000 inhabitants to establish transportation impact districts and collect transportation impact fees from persons constructing new housing developments in those districts.

Pursuant to the enabling act, the County passed several ordinances creating 11 different transportation impact districts and providing for the collection of road

impact fees from homebuilders (Du Page County Ordinances ODT-016-88, ODT-021A-89, ODT-21A-89, ODT-021B-89). The plaintiff is a development company which constructs new residences in Du Page County. Between November 22, 1988, and July 25, 1990, the County collected road impact fees from the plaintiff and other homebuilders. On July 26, 1989, the legislature repealed the enabling act and passed the Road Improvement Impact Fees Law (605 ILCS 5/5-901 (West 1992)). As a result of this legislation, the County enacted a new ordinance concerning the collection of road impact fees which became effective on July 25, 1990. The instant appeal concerns only those impact fees collected by the County prior to July 25, 1990.

Between January 17, 1989, and July 25, 1990, the plaintiff paid a total of $63,580 in road impact fees to the County. The plaintiff submitted each payment under protest. In 1988, the plaintiff and several other homebuilders filed a lawsuit against the County in the circuit court of Du Page County. See *Home Builders Ass'n of Greater Chicago et al. v. County of Du Page*, No. 88 MR 683 (Cir. Ct. Du Page Co.). In that case, the plaintiff requested a declaration that the enabling act and the Du Page County ordinances enacted pursuant thereto were unconstitutional. The plaintiff also sought the entry of an order requiring the County to refund all road impact fees paid by the plaintiff and the other named homebuilders. Although the plaintiff moved for judgment on the pleadings in that case on June 15, 1990, no judgment was ever entered on the merits and the case was voluntarily dismissed in November 1990.

The constitutionality of the enabling act and the Du Page County ordinances was again attacked in a separate lawsuit brought by different homebuilders in *Northern Illinois Home Builders Ass'n v. County of Du Page et al.*, 165 Ill. 2d 25 (1995) (hereinafter referred to as *NIHBA*). On March 23, 1995, the Illinois Supreme Court filed an opinion in that case holding that the enabling act was unconstitutional. *NIHBA*, 165 Ill. 2d at 35. The court's opinion also provided that "the Du Page County ordinances passed pursuant to the * * * enabling act are invalid and the monies collected thereunder should be returned." *NIHBA*, 165 Ill. 2d at 35-36. The plaintiff in the instant case was not a party to the *NIHBA* case.

Following the Illinois Supreme Court's holding in *NIHBA*, the plaintiff requested the County to return the $63,580 in road impact fees that it had paid between January 17, 1989, and July 25, 1990. The County refused the plaintiff's request for a refund.

On February 8, 1996, the plaintiff filed the instant class action suit, requesting that the County be ordered to return all of the road impact fees paid between November 22, 1988, and July 25, 1990. The plaintiff alleged that, during this period, the County had collected an aggregate amount of $6,194,056.22 in impact fees from the members of the class. As subsequently amended, the plaintiff's complaint consisted of three counts. Count I was entitled "mandamus" and sought an order requiring the County to immediately return the impact fees paid by each class member. Count II was entitled "declaratory judgment" and sought an order declaring that the County was indebted to each class member in an amount equal to the total road impact fees paid by that class member. Count

III was entitled "restitution, assumpsit, unjust enrichment, and recovery of payment" and sought an order that the County be required to deposit all of the collected road impact fees into a common fund for the benefit of the members of the class.

On July 10, 1996, the County filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619) (West 1996)). In its motion, the County argued that plaintiff's complaint was time-barred by section 13-205 of the Code, which imposes a five-year limitations period on "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 1996). The County argued that the plaintiff had failed to file its complaint within five years from the date it had actually paid the road impact fees to the County. Alternatively, the County argued that the plaintiff's complaint should be barred under the doctrine of *laches*.

In response to the motion, the plaintiff argued that its cause of action did not accrue until the Illinois Supreme Court filed its opinion in the *NIHBA* case on March 23, 1995. The plaintiff argued that, prior to the ruling in *NIHBA*, it had no right to a refund of the impact fees. The plaintiff therefore concluded that the instant class action was a timely attempt to "enforce" the supreme court's ruling in *NIHBA* that the monies collected pursuant to the invalidated ordinances "be returned." On November 5, 1996, following argument, the trial court denied the County's motion to dismiss.

On March 4, 1997, the trial court entered an order certifying as a class "[a]ll persons or entities who paid

impact fees to the [County] and/or claim refund pursuant to * * * Ordinance Nos. [ODT]-016-88; ODT-021-89; ODT-021A-89; and ODT-021B-89 during the period of the effective enforcement of said ordinance[s] which was from November 22, 1988, through July 25, 1990, which ordinance[s] w[ere] declared to be unconstitutional by the Illinois Supreme Court." The trial court also identified as a sub-class those homebuyers who were entitled to a refund because their developer/builder had incorporated the charge for the road impact fees into the purchase price of their homes.

On September 22, 1997, the plaintiff filed a motion for summary judgment as to each count of its complaint. The plaintiff argued that there existed no genuine issue as to the County's obligation to return the road impact fees and as to the amount of the refund due. The plaintiff therefore argued that it was entitled to judgment as a matter of law. On November 24, 1997, the trial court entered an order granting the motion for summary judgment. The County filed a notice of appeal from this order, but this court dismissed the appeal. See *Sundance Homes, Inc. v. County of Du Page et al.*, No. 2-97-1232 (February 6, 1998).

On March 13, 1998, the trial court entered an order creating a common fund for the benefit of the class and directing the Du Page County Treasurer to transfer $6,194,056.22 into the fund.

In March 1998, a court-approved "Notice of Class Action and Hearing on Attorneys' Fees" was sent to all ascertainable members of the class by first class mail and also published in certain newspapers. Accompanying this

notice was a copy of the plaintiff's petition for attorney fees. The notice advised the class members that they could either register their claims for a refund out of the common fund or "opt-out" of the class. By the end of the registration period, class members representing claims totaling $68,000 chose to "opt-out" of the class. Class and sub-class members representing claims totaling $2,406,745 registered to participate in the distribution of the common fund. Of these claims, there were several dual registrations made by homebuilders and home-buyers claiming a refund to the same $37,800 in impact fees.

On September 3, 1998, the trial court entered the following orders: (1) that the County had no standing to be heard on the plaintiff's petition for attorney fees; (2) that attorney fees would be calculated based upon the entire common fund and not just the claimed portion of the fund; (3) that attorney fees would be paid from the unclaimed portion of the fund; (4) that an additional $37,800 would be paid out of the unclaimed fund in order to satisfy all of the dual claims; and (5) that the class would receive prejudgment interest at a rate of 5% from the date that the action was filed.

On June 8, 1998, Fifield Companies, Inc., Cambridge Homes, Inc., Cambridge Properties, Lexington Homes, L.L.C., Prentiss Properties Acquisition Partners, L.P., Kingsport Development, Inc., Strategic Realty Advisors, Inc., Catellus Development Corporation, Plitt Theatres, Inc., and Toys "R" Us, Inc. (collectively referred to as the intervenors), filed motions pursuant to 735 ILCS 5/2-804(a) (West 1998) to intervene in the class action in

order to challenge the class certification and the plaintiff's petition for attorney fees. Each of these entities had paid road impact fees under the invalidated ordinances and were members of the class. Although the trial court did not rule on these motions to intervene, these entitles did participate in all aspects of the lawsuit after June 8, 1998.

On November 4, 1998, the trial court conducted a hearing on the plaintiff's petition for attorney fees. At this hearing, the plaintiff's counsel presented a detailed summary of the legal services performed on behalf of the class and the expenses incurred in prosecuting the case. The plaintiff's counsel also provided the testimony of two expert witnesses who had experience in class action litigation. Both witnesses outlined the benefits and results achieved for the class and concluded that an award of attorney fees in an amount equal to one-third of the common fund would be appropriate.

On January 15, 1999, the trial court entered an order awarding 21.289% of the common fund as attorney fees. The common fund, including prejudgment interest, totaled $7,045,720. Applying the trial court's percentage award to the common fund resulted in a fee award of $1,500,000.

Also on January 15, 1999, the trial court entered a final dispositional order which contained the following provisions: (1) that $2,737,672 (claims of $2,406,745 plus prejudgment interest of $330,927) be paid out of the common fund to satisfy all of the registered claims of the class; (2) that $1,500,000 be paid out of the remaining unclaimed portion of the common fund to satisfy the

award of attorney fees; (3) that $68,000 of the unclaimed portion of the common fund be returned to the County to satisfy the potential claims of class members who had "opted-out;" (4) that $37,800 be paid out of the unclaimed portion of the common fund to satisfy all of the dual claims made by homebuilders and homeownwers; (5) that the remainder of the unclaimed portion of the fund be returned to the County's general fund subject to the County's reducing its next real estate tax levy on all county taxpayers by that amount; and (6) that enforcement of the order would be stayed pending any appeal.

At the time the trial court entered its final dispositional order, the intervenors renewed their request for a ruling on their still-pending motions to intervene. The intervenors argued that they wanted a ruling on their motions for the express purpose of protecting their rights and interests in any appeal from the trial court's judgment. Over the objection of the attorney representing the class, the trial court granted the motions to intervene. The County did not object to the intervenors' motions.

Following the entry of the trial court's final dispositional order, the County filed a timely notice of appeal.

DISCUSSION

A.

Prior to addressing the merits of the instant appeal, we must resolve a motion that has been taken with the case. The County has filed a motion seeking to strike the appellate brief that was jointly filed by the intervenors. The County argues that the intervenors' appellate brief does not address the issues of class certification and

attorneys fees, which issues were the basis for the intervenors' initial request to intervene. Instead, the intervenors' brief addresses many of the same issues that have been briefed by the plaintiff. The County therefore argues that the intervenors' brief should be stricken because it exceeds the scope of their interest during the proceedings below and because it is redundant of the plaintiff's brief.

Section 2-804(a) of the Code provides that any class member may seek to intervene in the action with leave of court and that such leave shall be "liberally granted." 735 ILCS 5/2-804(a) (West 1998). As detailed above, on January 15, 1999, the intervenors specifically renewed their motions to intervene so that they could ensure that their interests would be adequately protected on appeal. The intervenors' claims collectively totaled $985,554 (41%) of the $2,406,745 in registered claims. At no time did the County object to the requested intervention and the trial court granted the motions to intervene.

Pursuant to section 2-408(f) of the Code, an intervener possesses all of the rights of an original party. 735 ILCS 5/2-408(f) (West 1998). Included among an intervenor's rights in the right to advance its position on appeal. See *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 162 (1998). Accordingly, we conclude that the intervenors herein had the right to file an appellate brief responding to the County's arguments on appeal. We therefore deny the County's motion to strike.

B.

The County's first contention on appeal is that the trial court erred in denying its motion to dismiss the

plaintiff's complaint pursuant to section 2-619 of the Code. The County argues that the action was time-barred pursuant to section 13-205 of the Code as it was not filed within five years from the date that the road impact fees were paid. Alternatively, the county argues that the action was barred under the doctrine of *laches*.

When considering a motion to dismiss, a reviewing court must accept as true all well-pleaded facts as well as those inferences that may reasonably be drawn from those facts. *Raintree Homes, Inc. v. Village of Kildeer*, 302 Ill. App. 3d 304, 307 (1999). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that would entitle the plaintiff to relief. *Raintree Homes*, 302 Ill. App. 3d at 307. A pleading need show only the possibility of recovering, not an absolute certainty, and it should not be dismissed unless it appears that the pleader in no event would be permitted to recover. *Neuman v. City of Chicago*, 110 Ill. App. 3d 907, 913 (1982). The trial court's dismissal of an action pursuant to section 2-619 is reviewed *de novo*. *Wells v. Travis*, 284 Ill. App. 3d 282, 285 (1996).

Section 13-205 of the Code provides, in pertinent part:

> "[A]ctions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." 735 ILCS 5/13-205 (West 1996).

The parties initially dispute whether that the instant action is "a civil action not otherwise provided for" so as to bring it within the five-year limitations period of section 13-205. The county argues that all taxpayer refund actions fall within the limitations period of section 13-205. The plaintiff responds by arguing that its complaint sounds in equity and is therefore not subject to a statutory limitations period.

In *Raintree Homes, Inc. v. Village of Kildeer*, 302 Ill. App. 3d 304 (1999), this court recently considered whether a suit seeking the refund of impact fees was time-barred. In that case, two builders filed a declaratory judgment action against a village seeking a declaration that its impact fees were unconstitutional and beyond the village's statutory authority. *Raintree Homes*, 302 Ill. App. 3d at 305. The builders also sought an order requiring the village to refund certain impact fees that they had paid. *Raintree Homes*, 302 Ill. App. 3d at 305. The trial court dismissed the action, ruling that it was barred by the one-year limitations provision in the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-1001 (West 1996)), *Raintree Homes*, 302 Ill. App. 3d at 307.

On appeal, we held that the five-year limitations period contained in section 13-305 of the Code, rather than the one-year provision contained in 745 ILCS 10/8-101 (West 1996), applied to the builders' action. *Raintree Homes*, 302 Ill. App. 3d at 307. In so holding, we noted that builders are entitled to refunds of impact fees that are not specifically and uniquely attributable to their activities. We explained that an action seeking a refund of such fees is not based in tort but is rather a claim based

upon an abuse of governmental authority. *Raintree Homes*, 302 Ill. App. 3d at 307. As such, the builders' suit was "a civil action not otherwise provided for" and was governed by section 13-205. *Raintree Homes*, 302 Ill. App. 3d at 307. Because the challenged ordinances were in effect within five years of the filing of the builders' action, we held that the action had been timely filed. *Raintree Homes*, 302 Ill. App. 3d at 307-08.

The instant case is also similar in many respects to *Rath v. City of Chicago*, 207 Ill. App. 117 (1917). *Rath* involved an action for a refund of detective license fees collected by the City of Chicago for a four-year period beginning in 1911. The city ordinance imposing the fees was declared unconstitutional by the Illinois Supreme Court in 1915 in a separate case to which the plaintiff in *Rath* was not a party. *Rath*, 207 Ill. App. 3d at 118. After the declaration of unconstitutionality, the plaintiff in *Rath* brought suit to recover all of the licensing fees paid to the city. *Rath* 207 Ill. App. at 118-19. The *Rath* court held that the five-year limitations period applied to the action, and that the limitations period commenced at the time the fees were paid. Accordingly, the court affirmed the disallowance of refunds on licensing fees paid more than five-years preceding the action. *Rath*, 207 Ill. App. at 121-22.

Section 13-205 has also been applied in other cases where individuals have sought real estate tax refunds or other benefit payments from governmental entities. For example, in *Hamer v. Anderson*, 594 F. Supp. 561 (N.D. Ill. 1984), a taxpayer filed a federal civil rights action to collect interest upon real property taxes that had been wrongfully collected by the county collector. After noting that federal civil rights actions are governed by the state

statute of limitations that would govern the most analogous state cause of action, the court held that the section 13-205 applied to the case. *Hamer*, 594 F. Supp. at 564 n.3. In *North American Cold Storage Co. v. County of Cook*, 468 F. Supp. 424 (N.D. Ill. 1979), certain taxpayers filed a federal civil rights action alleging that the county's real estate tax assessments on their property were discriminatory. The court held that section 13-205 governed the action and found that the taxpayer's action accrued at the time the excessive taxes were paid. *North American*, 468 F. Supp. at 426-27 (1979). See also *Lyons v. Morgan County*, 313 Ill. App. 296, 298 (1942) (five-year limitation was a bar to certain claims for unpaid amounts owed by county pursuant to the Relief for the Blind Act).

The plaintiff argues that section 13-205 is not applicable herein because its complaint sought equitable relief. The plaintiff argues that statutes of limitations are applicable only in actions at law, and that they are not directly controlling in suits seeking equitable relief. See *Meyers v. Kissner*, 149 Ill. 2d 1, 12 (1992). The plaintiff argues that, while a court of equity may consider statutes of limitations as a convenient measure for ascertaining the length of time in which an equitable action may be brought, it may grant relief after the limitations period has expired when the circumstances warrant such a result. *Meyers*, 149 Ill. 2d at 12.

Although we agree with the plaintiff that claims of equity are generally not governed by any statute of limitations, we nonetheless note that Illinois courts have occasionally applied section 13-205 as a bar to equitable actions. See *Hagney v. Lopeman*, 147 Ill. 2d 458, 462 (1992) (section 13-205 applies to an action for constructive trust);

Finke v. Woodard, 122 Ill. App. 3d 911, 915 (1984) (section 13-205 applies to an action seeking the equitable remedy of rescission); *Santucci Construction Co. v. Metropolitan Sanitary District of Greater Chicago*, 9 Ill. App. 3d 491, 494 (1972) (in cases where the enforcement of a private right is involved, the five-year limitation is applicable to a mandamus action); *Gibraltar Insurance Co. v. Varkalis*, 115 Ill. App. 2d 130, 136-37 (1969) (holding that declaratory judgment is a statutory action and is therefore subject to the five-year limitations period as "a civil action not otherwise provided for"). Therefore, contrary to the plaintiff's assertions, there is authority holding that the five-year limitation period can be applied to equitable claims.

Additionally, we note that the remedy sought by the plaintiff herein is not truly equitable in nature. Although the plaintiff entitles count I "mandamus" and count II "declaratory judgment," we note that the prayer for relief in each count is essentially one for money damages. The mandamus count requests that the County be ordered "to immediately return to each Class Participant the impact fees paid by said Class Participant." The declaratory judgment count requests an order declaring that the County "is indebted to each Class Participant in the aggregate amount of impact fees paid by each member of said Class." Therefore, although the plaintiff has artfully drafted its complaint in the language of equity, it nonetheless seeks the award of money damages. Moreover, we note that count III, which is predicated upon unjust enrichment, is also an action at law. See *Partipilo v. Hallman*, 156 Ill. App. 3d 806, 810 (1987) (unjust enrichment is an action based in law rather than equity); see also *Burns*

Philip Food, Inc. v. Cavalea Continential [sic] *Freight, Inc.*, 135 F.3d 526, 527-28 (7th Cir. 1998).

As the plaintiff seeks money from the County, we believe that the instant complaint is akin to the claims at issue in *Rainbow Homes* and *Rath*. Like the plaintiffs in those cases, the plaintiff seeks a refund of a fee that a governmental entity collected without authority. Because the remedy sought by the plaintiff class is essentially one for money, we conclude that the instant case is "a civil action not otherwise provided for" and is therefore subject to the limitations period provided for in section 13-205 of the Code. See *Raintree Homes*, 302 Ill. App. 3d at 307; *Rath*, 207 Ill. App. at 121-22.

In so holding, we note that *Ross v. City of Geneva*, 43 Ill. App. 3d 976 (1976), *aff'd*, 71 Ill. 2d 27 (1978), and *Board of Trustees of Police Pension Fund v. Glen Ellyn* [sic], 337 Ill. App. 183 (1949), are distinguishable from the case at bar. In *Ross*, the plaintiff filed an action seeking a refund of a municipal surcharge fee that had been incorporated into his electric bill. *Ross*, 43 Ill. App. 3d at 977-78. The plaintiff argued that the fee was unconstitutional and sought a refund of all fees collected for the preceding 13 years. *Ross*, 43 Ill. App. 3d at 978. On review, this court held that the five-year limitations period did not apply because the complaint sought the equitable remedy of the imposition of a constructive trust. *Ross*, 43 Ill. App. 3d at 985. However, unlike the instant case, the plaintiff in *Ross* was not aware that the fee was being assessed during the 13 years it had been collected because it had been unidentified on the bill. *Ross*, 43 Ill. App. 3d at 978. In the instant case, there is no dispute that the plaintiff knew of the fee at the time it was paid.

In *Board of Trustees of Police Pension Fund v. Village of Glen Ellyn*, 337 Ill. App. 183 (1949), the Village of Glen Ellyn failed to create and allocate funds to a police pension board between 1932 and 1945 as required by state law. When the village finally created the pension board, the pension board filed a mandamus action seeking an order compelling the village to pay those fees which it owed the pension board for the previous 13 years. *Board of Trustees*, 337 Ill. App. at 187, 190. On appeal, this court rejected the village's reliance upon the five-year limitations period, explaining that the village's wrongful act prevented the creation of a proper legal entity to protect and supervise the pension fund until 1946. This court stated that equitable principles would not permit the village to benefit from its wrongful act. *Board of Trustees*, 337 Ill. App. at 198. In the instant case, unlike *Board of Trustees*, there was no legal impediment which prevented the plaintiff from seeking an immediate refund of the road impact fees after they were paid. Lacking the compelling equitable considerations presented by *Ross* or *Board of Trustees*, we hold that section 13-205 applies to the instant action.

The plaintiff next argues that, even if section 13-205 applies to the instant case, the limitations period did not begin to run until the Illinois Supreme Court decided the *NIHBA* case on March 23, 1995. The plaintiff argues that, prior to the Illinois Supreme Court's decision in *NIHBA*, this court had held that the ordinances were constitutional and that it had no legal right to a refund. See *NIHBA*, 251 Ill. App. 3d 494 (1993). The plaintiff contends that, had it filed the instant action prior to the supreme court's decision in *NIHBA*, the case would have been

dismissed and the plaintiff would have been subject to fees and costs under Supreme Court Rule 137.

We believe that this contention is without merit. The *NIHBA* case did not establish a builder's right to challenge the payment of impact fees. Indeed, there have been numerous constitutional challenges to development impact fees which predate the instant litigation. See *Krughoff v. City of Naperville*, 68 Ill. 2d 352 (1977); *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375 (1961). As a result of these challenges, the Illinois Supreme Court has held that governmental fees and exactions may constitute an unconstitutional taking of property when those fees are not tied to a need that is "specifically and uniquely" attributable to the fee payer. See *Pioneer Trust*, 22 Ill. 2d at 381-82.

Therefore, from the time that the plaintiff paid the road impact fees, it could have asserted a constitutional challenge to the enabling act and the Du Page County ordinances and requested a refund. Indeed, the plaintiff's own conduct herein demonstrates its awareness that it could have asserted such a challenge. Between January 17, 1989, and July 25, 1990, when the plaintiff paid road impact fees to the County, it submitted each payment under protest for the express purpose of preserving its right to challenge the enforceability and constitutionality of the Du Page County ordinances.

Moreover, it appears that the plaintiff was aware of its right to challenge the constitutionality of the enabling act and Du Page County ordinances even prior to its first payment of impact fees to the County on January 17, 1989. As noted above, the plaintiffs initially filed suit in

1988 seeking (1) to enjoin enforcement of the Du Page County ordinances; (2) a declaration that the ordinances and the enabling act were unconstitutional; and (3) an order to require the County to refund any impact fees that it had received. In that suit, the plaintiff alleged that the ordinances were unconstitutionally vague and that the enabling act was unconstitutional special legislation. We note that these allegations were also advanced in the *NIHBA* litigation. *NIHBA*, 165 Ill. 2d at 29. Rather than proceed with this timely filed action, the plaintiff voluntarily dismissed this action in November 1990, some three years before this court's opinion in *NIHBA*. Although we cannot determine why the plaintiff chose to abandon its right to challenge the legislation and seek a refund, this remedy was nonetheless available to the plaintiff and accrued at the time the impact fees were paid. See *Pioneer Trust*, 22 Ill. 2d at 381-82.

For this reason, we note that the circumstances herein are distinguishable from those federal authorities relied upon by the plaintiff. See *Neely v. United States*, 546 F. 2d 1059 (3d Cir. 1976); *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F. 2d 1353 (5th Cir. 1972). In both *Neely* and *1961 Impala*, plaintiffs were permitted to prosecute untimely actions to seek a return of forfeited property and fines imposed for their failure to comply with federal wagering tax statutes after the United States Supreme Court held that such sanctions violated the constitutional guarantee against self-incrimination. See *Marchetti v. United States*, 390 U.S. 39, 19 L. Ed. 2d 889, 88 S. Ct. 697 (1968). The plaintiffs in *Neely* and *1961 Impala* were permitted to prosecute the untimely actions because the United States Supreme Court's *Marchetti* decision had

overruled previous United States Supreme Court decisions upholding the constitutionality of the fines and penalties under the Tucker Act. The courts in *Neely* and *1961 Impala* held that the United States Supreme Court's decision in *Marchetti* had been "unknowable" and that the plaintiffs had been without the right to sue prior to the decision. *Neely*, 546 F. 2d at 1068; *1961 Impala*, 457 F. 2d at 1358.

In the instant case, unlike *Neely* and *1961 Impala*, the plaintiff's right to challenge the constitutionality of impact fees was clearly established in 1961 by the Illinois Supreme Court in *Pioneer Trust*. Additionally, prior to the *NIHBA* decision in 1995, there had been no previous decision by the Illinois Supreme Court concerning the constitutionality of the enabling act and the Du Page County ordinances. We therefore conclude that, unlike *Neely* and *1961 Impala*, the plaintiff had a valid cause of action that was available to it on the date that the impact fees were paid.

Moreover, the plaintiff's assertion that it would have been subject to Rule 137 sanctions if it had pursued its constitutional claim is entirely speculative. There is no indication that a motion to dismiss or a motion for Rule 137 sanctions had been filed against the plaintiff in its earlier suit. Nor do we believe that such a constitutional challenge would have been subject to Rule 137 sanctions; indeed, we note that the plaintiff's position was ultimately adopted by our supreme court in *NIHBA*. The plaintiff certainly cannot be excused from timely pursuing its claim merely because this court had found that the enabling act was constitutional. See *NIHBA*, 251 Ill. App. 3d at 511. Had such a suit been rejected at the trial level

and by this court, the plaintiff would have had an opportunity to seek review by our supreme court. For these reasons, we see no reasonable basis why the plaintiff could not have pursued the instant litigation within the applicable limitations period.

We also reject the plaintiff's assertion that the instant litigation is merely an attempt to "enforce" that portion of the *NIHBA* ruling that ordered the monies collected under the enabling act and the invalidated ordinances be returned. The plaintiff was not a party to the *NIHBA* case and did not seek to intervene during those proceedings. Rather, *NIHBA* was a separate suit brought by nine other builders seeking a refund of the road impact fees paid to the County. The plaintiff cannot now attempt to bootstrap itself to the *NIHBA* litigation when it was not a participant. The supreme court's order that the County return the road impact fees applies only to the nine builders that were party to the *NIHBA* suit. For all of these reasons, we hold that the instant action was time-barred by section 13-205 of the Code.

In reaching this conclusion, we note that even if the plaintiff's claims had been truly equitable in nature, its action would nonetheless have been time-barred under the doctrine of *laches*. The doctrine of *laches* applies to bar an equitable action where the plaintiff failed to diligently bring the action and the defendant was prejudiced thereby. *Van Milligan v. Board of Fire and Police Commissioners*, 158 Ill. 2d 85, 89 (1994). In order to assert the doctrine of *laches*, the defendant must plead sufficient facts to show a lack of diligence on the part of the plaintiff. *Schons v. Monarch Insurance Co.*, 214 Ill. App. 3d

601, 609 (1991). When the grounds for *laches* is not apparent from the facts of the complaint, the defendant must provide an affidavit setting forth the facts upon which the defendant relies. *Summers v. Village of Durand*, 267 Ill. App. 3d 767, 771 (1994).

We agree with the County that the plaintiff's conduct herein demonstrates a lack of diligence in pursuing its claim. From the time that the plaintiff paid the road impact fees under protest, the plaintiff indicated its intent to challenge the constitutionality of the enabling act and the ordinances. The plaintiff subsequently initiated and dismissed a lawsuit seeking a refund of the fees. Such conduct evidences that the plaintiff was aware that it had the right to challenge the constitutionality of the fees from the time of payment. Despite this knowledge, the plaintiff did not initiate and fully prosecute such an action for more than five years. The plaintiff offers no explanation for this delay other than a speculative assertion that such an action would have been subject to Rule 137 sanctions. As detailed above, we do not believe that this was a reasonable basis for delay.

We also believe that the plaintiff's lack of diligence resulted in prejudice to the County. As evidenced by the County's verified pleadings and the sworn affidavit of County Engineer Charles Tokarski, the County has spent all of the road impact fees it received under the invalidated ordinances to construct road improvements necessitated by the new housing developments. Moreover, the plaintiff does not dispute that it was aware that the County was using the impact fees to construct road improvements in the areas of new development. In essence, the plaintiff silently watched as the County spent

all of the contested impact fees. Under these circumstances, we do not believe that equity mandates an extended period to allow the plaintiff to initiate proceedings. Accordingly, the plaintiff's action would have also been barred under the doctrine of *laches*.

In light of our conclusion that the instant action is time-barred, we need not consider the County's alternative arguments on appeal.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed.

Reversed.

GEIGER, J., with INGLIS and HUTCHINSON, JJ., concurring.

APPENDIX C

UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT

Sundance Homes, Inc. et al.	)	
Plaintiff's	)	
	)	No. 96 MR101
Vs.	)	
County of DuPage, et al.	)	
	)	
Defendant's	)	

ORDER

This cause coming to be heard on the Defendants' Motion to Strike under § 2-615 and Motion to Dismiss under § 2-619; the Court having heard argument of counsel and having received supporting authorities finds that the Plaintiff's complaint sets forth causes of action for which relief may be based and that the Defendants' Motions should be denied.

It is hereby ordered that the Defendants' Motion to Strike and Motion to Dismiss are hereby denied and the Defendants are given leave to respond to Plaintiffs' Amended Complaint on or before Dec. 3, 1996. Case continued to Dec. 18, 1996 at 10:00 a.m. for status.

Name LARAIA & Hubbard
DuPage Attorney No. 007
Attorney for Plaintiff
Address 1761 S. Naperville Rd
City Wheaton, Ill 60187
Phone (630) 690-6800

Enter: /s/ Robert E. Byrne
JUDGE

Date: 11/5/96

JOEL A. KAGANN, CLERK OF THE 18TH JUDICIAL CIRCUIT COURT
WHEATON, ILLINOIS 60189-0707

APPENDIX D

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, STATE OF ILLINOIS,
COUNTY OF DU PAGE

SUNDANCE HOMES, INC., an Illinois corporation, individually and on behalf of others similarly situated,	)	Case No. 96 MR 101
Plaintiffs,	)	
vs.	)	
THE COUNTY OF DU PAGE, a body politic; GEORGE KOUBA, Director of Finance; JOHN L. NOVAK, DuPage County Treasurer; and DONALD G. ZEILENGA, DuPage County Director of the Division of Transportation,	)	
Defendants.	)	

ORDER OF CLASS CERTIFICATION

(Filed Mar. 4, 1997)

This cause coming to be heard on the Motion of the Plaintiff, SUNDANCE HOMES, INC., pursuant to 735 ILCS 5/2-802(a), to certify the entitled action as a class action and to certify the following described individuals and entities as a class of Plaintiffs herein, the Court having considered the evidence presented and having heard the arguments of counsel finds as follows:

1. That this action is sought to be maintained as a class action on behalf of all person or entities who paid impact fees to the County of DuPage, State of Illinois, and/or claim a right to refund pursuant to DuPage

County Ordinance Nos. DTO-016-88, ODT-021-89; ODT-021A-89 and ODT-021B-89 during the period of the effective enforcement of said ordinance which was from November 22, 1988 through July 25, 1990 which ordinance was declared to be unconstitutional by the Illinois Supreme Court and pertained to the imposition of impact fees upon builders and individuals who built upon or developed real estate located within the County of DuPage and State of Illinois.

2. The class, as defined hereinabove by the Plaintiff, consists of approximately One Thousand Three Hundred Seventy-seven (1377) or more individuals and entities who allegedly paid impact fees to the County of DuPage between November 22, 1988 and July 25, 1990 pursuant to DuPage County Ordinance Nos. DTO-016-88, ODT-21-89; ODT-021A-89 and ODT-021B-89 and/or claim a right to a refund; which impact fees pertain to the improvement of approximately 5290 or more parcels of real property in the County of DuPage.

3. The class action is superior to other methods for the fair and efficient adjudication of the matter.

4. There are questions of law and fact that are common to the class which predominate over questions which affect only the individual members.

5. The questions of law and fact predominate over questions affecting only the individual members of the class.

6. The claims of the Plaintiff, SUNDANCE HOMES, INC., are typical of claims for refund that pertain to the other members of the class.

7. The Plaintiff, SUNDANCE HOMES, INC., and its counsel, will fairly and adequately protect the interest of the class.

8. Notice of the maintenance of this class action will be adequately provided to the members of the class by first class mail in the form to be submitted to this Court.

IT IS HEREBY ORDERED as follows:

A. That this action is a proper class action and may be so maintained as a class action pursuant to 735 ILCS 5/2-802(a), and the Class is certified as hereby is as follows:

> All persons or entities who paid impact fees to the County of DuPage, State of Illinois, and/or claim a refund, pursuant to DuPage County Ordinance Nos. DTO-016-88, ODT-021-89; ODT-21A-89 and ODT-021B-89 during the period of the effective enforcement of said ordinance which was from November 22, 1988 through July 25, 1990 which ordinance was declared to be unconstitutional by the Illinois Supreme Court and pertained to the imposition of impact fees upon builders and individuals who built upon or developed real estate located within the County of DuPage and State of Illinois.

B. The named Plaintiff, SUNDANCE HOMES, INC., is hereby designated as the representative party of the class, as heretofore defined, and Joseph M. Laraia of the law firm of Laraia & Hubbard, P.C., and Vincent L. DiTommaso of the law firm of DiTommaso & Berman, P.C. hereby designated as counsel for the class.

C. The best practicable notice under the circumstances to be provided to the members of the class shall be by first class mail in the form to be submitted to this Court and shall be provided to all individuals and entities who paid the impact fees pursuant to DuPage County Ordinance Nos. DTO-016-88; ODT-21-89; ODT-021A-89 and ODT-021B-89 as listed on Exhibit A attached to Plaintiff's Complaint and those individuals or entities who claim a refund to be identified hereafter and by publication in the Chicago Tribune and USA today newspaper for three (3) successive weeks prior to the date set for members of the Class to opt out of the Class, which forms of notice shall constitute compliance with 735 ILCS 5/2-803.

D. The issue of the award of attorney's fees and costs is reserved for later determination by this Court.

E. The entitled matter is continued to the 1st day of April, 1997 at 10:00 a.m. in Courtroom 2009 for status.

DATED: 3-4-97

/s/ Robert E. Byrne
JUDGE

SALVATORE J. SCIFO
DEPUTY CLERK

LARAIA & HUBBARD, P.C.
#007
1761 South Naperville Road
Wheaton, IL 60187
630-690-6800

APPENDIX E

STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

SUNDANCE HOMES, INC., an Illinois corporation individually and on behalf of others similarly situated	)	NO. 96 MR 101
v.	)	
THE COUNTY OF DU PAGE, ET AL.	)	

ORDER

(Filed Nov. 24, 1997)

This cause coming to be heard upon the Plaintiff's Motion for Summary Judgment; the Court having been provided with Memorandums and argument in support and opposition thereto find that the Plaintiff's Motion should be granted herein for the causes set forth in the transcript of this Court's ruling made on November 10, 1997, a copy of which will be filed herein when said transcript is prepared;

IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment be, and the same is, hereby granted and a judgment entered herein in favor of the Plaintiff's and against the Defendants herein.

IT IS FURTHER ORDERED that the entitled matter is continued to December 8, 1997 at 10:00 a.m. for status.

/s/ Robert E. Byrne
JUDGE

DATED: 11/24/97

LARAIA & HUBBARD, P.C.
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630-690-6800

APPENDIX F

STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

SUNDANCE HOMES, INC., an Illinois corporation, individually and on behalf of others similarly situated Plaintiff v. THE COUNTY OF DU PAGE, a body politic; GEORGE KOUBA, Director of Finance; JOHN L. NOVAK DuPage County Treasurer; and DONALD G. ZEILENGA, DuPage County Director of the Division of Transportation Defendants	)	NO. 96 MR 101

ORDER

This cause having previously been heard on the Plaintiff Class' Petition for Attorneys Fees and Costs to be awarded to said attorneys for representing the Plaintiff Class herein; the Court having previously heard evidence from witnesses and having been provided with exhibits concerning the method and amount of attorneys fees that should be awarded herein has found as follows:

1. That the applicable method for awarding attorneys fees in this case is the percentage method.

2. That the common fund created for the Plaintiff Class is in the amount of $6,194,056 plus interest commencing with the filing of the Complaint herein on February 8, 1996, which interest is in the amount of five (5%) percent per annum through the date of payment and as of November 30, 1998 and that the interest on the common fund is in the additional amount of $851,682 for a total class fund, through November 30, 1998, of $7,045,720.

3. That the appropriate percentage to be applied to the common fund as for the attorneys' fees prayed for in the Plaintiff's Amended Petition for Attorneys Fees and Costs is $21.289% [sic] for an award of $1,500,000.

4. That claims have been filed by members of the Class, pursuant to the claim procedure established by this Court, which total $2,406,745 pursuant to the Report filed by the Plaintiff Class' attorneys and that interest on said amount through the end of November, 1998 is in the aggregate amount of $330,927 for a total of $2,737,672.

5. That the claimed portion of the common fund, the attorneys' fees and costs portion of the common fund and the unclaimed portion of the common fund be segregated from each other until distribution thereof;

6. That the claimed portion of the fund, plus interest as ordered herein be distributed forthwith pursuant to the Report submitted by the Plaintiff Class' attorneys.

7. That the attorneys' fees and costs be distributed to the Plaintiff Class' attorneys forthwith.

This cause coming before the Court for hearing on the final issue of the case which pertains to the distribution of the unclaimed portion of the common fund; and the Court having heard argument concerning the distribution thereof finds as follows:

1. That the amount of the impact fees paid by those members of the Class who have opted out of the Class, in the approximate amount of $68,000 be segregated and paid to the County general fund.

2. That the balance of the unclaimed portion be held until final distribution of the claimed portion of the fund, plus interest, and the distribution of attorneys fees and costs, plus interest, to assure the full payment of interest thereon through the date of payment.

3. That the remainder of the unclaimed portion of the fund after the payments set forth in Paragraphs 1 and 2, be applied to the current DuPage County real estate taxpayers' portion of the next county tax levy that is made after the date of the distributions to the claimant portion of the Class and payment of attorneys' fees, as set forth herein and said balance of the unclaimed portion of the fund shall abate said real estate taxpayers' portion of said levy by the amount remaining in the unclaimed portion of the fund.

IT IS HEREBY ORDERED AS FOLLOWS:

A. That the applicable method for awarding attorneys fees in this case is the percentage method.

B. That the Plaintiff Class' attorneys be, and are hereby, awarded 21.289% of the common fund, as set forth hereinabove, which attorneys' fees and costs are in

the amount of $1,500,000, which amount shall be paid forthwith and if there is an appeal of this order shall be segregated from the common fund and shall be held in a separate account with the DuPage County Treasurer for the benefit of said attorneys, which account shall bear interest, through the date of payment, which interest shall also be paid to said attorneys.

C. That distribution be made forthwith to those members of the class who have submitted claims, plus interest thereon through the date of payment as ordered by this Court, and if there is an appeal of this order claimants' portion of the common fund plus interest shall be segregated from the common fund and held in a separate account with the DuPage County Treasurer for the benefit of said claimants, until payment which account shall also bear interest which shall also be paid to said claimants.

D. That the unclaimed portion of the common fund shall be paid as follows:

1. The amount of the impact fees paid by those members of the Class who opted-out of the Class, in the approximate amount of $68,000 be segregated and paid to the County general fund.

2. That the balance of the unclaimed portion be held until final distribution of the claimed portion of the fund, plus interest, and the distribution of attorneys' fees and costs, plus interest, to assure the full payment of interest thereon through the date of payment.

3. That the remainder of the unclaimed portion of the fund, after the payments set forth hereinabove in

Paragraphs 1 and 2, be applied to the current DuPage County real estate taxpayers' portion of the next county tax levy that is made after the date of the distributions to the claimant portion of the Class and payment of the Class's attorneys' fees and costs, as set forth herein and said balance of the unclaimed portion of the fund shall abate said real estate taxpayers' portion of said levy by the amount remaining in the unclaimed portion of the fund. Furthermore, in the event of an appeal the unclaimed portion shall be held in a separate account by the DuPage County Treasurer for distribution upon the perfection of said appeal pursuant to the above distributions.

E. That the Defendants' Motion for Stay of the enforcement of this order is granted pending their appeal.

Dated: Nun pro tunc January 15, 1999

/s/ Robert E. Byrne
JUDGE

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DI TOMMASO & ASSOCIATES
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APPENDIX G

(LOGO)

Supreme Court of Illinois
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
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TELECOMMUNICATIONS
DEVICE FOR THE DEAF
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20TH FLOOR
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CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
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April 2, 2001

Mr. Joseph M. Laraia
Laraia & Hubbard, P.C.
1761 South Naperville
Suite 203
Wheaton, IL 60187

No. 88763 – Sundance Homes, Inc., etc., et al., appellants, v.
88764 The County of DuPage, etc., et al., appellees.
Cons. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petitions for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 12, 2001.

Garman, J., took no part.

APPENDIX H

STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT DU PAGE COUNTY, ILLINOIS

SUNDANCE HOMES, INC., an Illinois corporation, individually and on behalf of others similarly situated Plaintiff v. THE COUNTY OF DU PAGE, a body politic; GEORGE KOUBA, Director of Finance; JOHN L. NOVAK DuPage County Treasurer; and DONALD G. ZEILENGA, DuPage County Director of the Division of Transportation Defendants	NO. 96 MR 101

SECOND AMENDED COMPLAINT FOR MANDAMUS, DECLARATORY JUDGMENT AND RESTITUTION, ASSUMPSIT, UNJUST ENRICHMENT AND RECOVERY OF PAYMENT

(Filed Feb. 5, 1997)

Now come the Plaintiffs, SUNDANCE HOMES, INC., an Illinois corporation (hereinafter referred to as "Sundance") individually and on behalf of others similarly

situated (hereinafter referred to as "Class Participants") by LARAIA & HUBBARD, P.C., their attorneys and complain of the Defendants, THE COUNTY OF DU PAGE, a body politic; GEORGE KOUBA, Director of Finance; JOHN L. NOVAK, DuPage County Treasurer; and DONALD G. ZEILENGA, DuPage County Director of the Division of Transpiration [sic], as follows:

FACTS COMMON TO ALL COUNTS

1. At all times set forth herein, the Plaintiff, SUNDANCE, has been, and is, an Illinois corporation engaged in the business of developing real estate for use as a residential development or project.

2. The Defendant, THE COUNTY OF DU PAGE, is an Illinois body politic.

3. The Defendant, GEORGE KOUBA, is the Director of Finance of, and for, the Defendant, COUNTY OF DU PAGE, which office is the custodian of the impact fees paid to the County of DuPage pursuant to DuPage County Ordinance No. DT0-016-88, referred to hereinafter.

4. The Defendant, DONALD G. ZEILENGA, is the Director of the Division of Transportation of, and for, the Defendant, COUNTY OF DU PAGE, which office is responsible for the collection and return of the impact fees paid to the County of DuPage pursuant to DuPage County Ordinance No. DT0-016-88, referred to hereinafter.

5. The Defendant, JOHN L. NOVAK, is the Treasurer of, and for, the Defendant, COUNTY OF DU PAGE,

which office is the custodian of the impact fees paid to the County of DuPage pursuant to DuPage County Ordinance No. DT0-016-88, referred to hereinafter.

6. On November 22, 1988, pursuant to Ch. 121, Sec.5-608(a), (b) and (c) *Ill. Rev. Stats.*, the DuPage County Board adopted DuPage County Ordinance No. DT0-016-88, entitled "DuPage County Fair Share Transportation Impact Fee Ordinance", a copy of which is attached hereto as Exhibit A.

7. On June 29, 1989, the DuPage County Board repealed DuPage Ordinance No. DTO-016-88, and in its stead, pursuant to ch. 121, Sec. 5-608(a), (b), and (c) *Ill. Rev. Stats.*, enacted DuPage County Ordinance ODT-021-89 entitled "DuPage County Fair Share Transportation Impact Fee Ordinance", which ordinance was subsequently amended under numbers ODT-021A-89 and ODT-021B-89, copies of which said ordinances are attached hereto as Group Ex. B.

8. From November 22, 1988 through July 25, 1990, the Defendants imposed upon, collected and retained impact fees from owners and developers of real estate located in the County of DuPage, which fees were required to be paid to the County of DuPage pursuant to DuPage Ordinances No. DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 in order to obtain approval for, and the issuance of, final plats of subdivision, access permits, building permits and other governmental approvals and authorizations for the development and sale of real estate in the County of DePage [sic].

9. During the period from January 17, 1989 through July, 1990, the Plaintiff, SUNDANCE, was required to pay

impact fees in the aggregate amount of $63,580, the identity of which impact fees are set forth in Exhibit C attached hereto to the County of DePage [sic] pursuant to DuPage County Ordinances No. DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89.

10. On March 23, 1995 the Illinois Supreme Court in Sup.Ct. Case No. 76503, entitled Northern Illinois Home Builders Association, Inc., et al, Plaintiffs -vs- The County of DuPage, et al, Defendants, published at 165 Ill. 2d 25; 208 Ill. Dec. 328, 649 N.E. 2d 384 (1995), declared the State of Illinois Enabling Act, pursuant to which authority the DePage [sic] County Board enacted DuPage County Ordinances No. DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021A-89 [sic] to be unconstitutional and consequently found that all the DuPage County ordinances enacted thereunder were invalid. The Illinois Supreme Court ordered that "the monies collected thereunder should be returned."

11. In the original case, out of which the above appeal and decision in Supreme Court case No. 76503 originated, the trial court entered an order upholding the constitutionality of the Enabling Act, pursuant to which DuPage County Ordinances No. DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 was enacted and found that said Ordinance No. DT0-016-88 was also constitutional, which trial court order was affirmed by appeal to the Second Appellate Court District [sic] on October 6, 1993 in Second District Appellate Case no. 2-92-0963 published at 251 Ill. App. 3d 494, 621 N.E. 2d 1012, 190 Ill. Dec. 559 (2nd Dist., 1993).

CLASS ALLEGATIONS

12. For the period of time from November 22, 1988 through July 25, 1990 during which period impact fees were collected by the Defendants pursuant to DePage [sic] Ordinances DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89, numerous other real property owners and purchasers, developers and other individuals and entities were required to pay fees to the County of DuPage pursuant to said County Ordinance in the aggregate amount of $6,194,056.22 as is more fully set forth in Ex. C.

13. Pursuant to Sec. 5/2-801, et. seq. of the Illinois Civil Practice Act, (735 ILCS 5/2-801 et. seq.) the Plaintiff SUNDANCE brings the entitled action on behalf of said class of individuals and entities (referred to herein, as "Class Participants"), who were required to and paid impact fees pursuant to Dupage Ordinances DT0-016-88, ODT-021A-89, ODT-021A-89 and ODT-021B-89.

14. The CLASS PARTICIPANTS include all individuals and entities who were required to pay or incur an impact fee from November 22, 1988 through July 25, 1990, which was paid pursuant to DuPage County Ordinances DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89, which group of individuals and entities fulfill the requirements of Sec. 5/2-801 of the Code of Civil Procedure in that:

a. The Class contains approximately 1377 individuals or entities who actually paid the impact fees during the relevant time period, as set forth in detail in Exhibit C, and as a result of the Class being so numerous joinder of all the members is impracticable.

b. That the common, dominant and pervasive issue of fact and law is whether the impact fee charges, which were paid by the Plaintiffs pursuant to DuPage County Ordinances DTO-016-88,ODT-021-89, ODT-021A-89 and ODT-021B-89, is legally due the Plaintiffs as a result of the Illinois Supreme Court declaring the enabling statute under which the DuPage County ordinance was enacted unconstitutional and requiring that said impact fees be returned.

c. There are additional common questions of fact and law which are common to the Class and predominate over any questions which may affect any individual member including, but not limited to of which the individual or entity paid the impact fee, pursuant to DuPage Ordinances DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89, and whether the County of DePage [sic] has refunded said fee or charges.

d. The representative party Plaintiff, SUNDANCE, will fairly and adequately represent the interest of the Class by retaining experienced counsel to prosecute this action. Neither the Plaintiff nor its counsel have any interests which would lead them not to vigorously prosecute this action.

e. The Class is an appropriate method for the fair and efficient adjudication of the controversy in that most members of the Class are unaware of the wrong or their right to legal redress, the individual litigation of individual claims is not economically feasible and would be time consuming to the Court; the common claims are of a public rather than a private nature and in the absence of a class action, the common public

interest, created by the declaration of the unconstitutionality of the ordinance and order of the Supreme Court to refund the money, would go unredressed.

COUNT I

MANADAMUS

15. The Plaintiffs hereby adopt and reallege the allegations of Paragraph Nos. 1 through 13 hereinabove as Paragraphs 14 of Count I.

15.[sic] Subsequent to the entry of the above referred to Illinois Supreme Court decision, declaring the enabling Act and DuPage County Ordinances DT0-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 to be unconstitutional and ordering a return of the impact fees collected thereunder, the Plaintiff, SUNDANCE, demanded the Defendants to return the impact fees paid to the County of DuPage pursuant to said Ordinance in the aggregate amount of $63,580.00 as set forth in particular in Exhibit C.

17. The Defendants, through the DuPage County States Attorneys' Office, as refused, and continues to refuse, to return the above set forth impact fees as ordered by the Illinois Supreme Court.

18. There is no lawful reason or authority for the Defendants, in their official capacity, to retain, and refuse to return, the impact fees paid by the Plaintiffs pursuant to the invalid ordinance, and such delay in refusing to return said impact fees is vexatious in nature.

WHEREFORE, the Plaintiff, SUNDANCE HOMES, INC., an Illinois corporation, individually and on behalf

of the Class Participants respectfully prays this Court as follows:

A. To certify as a class, and as Plaintiffs herein, those individuals and entities who were required to pay, or incur, an impact fee to the County of DuPage from November 22, 1988 through July 25, 1990 pursuant to DuPage County Ordinances DT0-016-88, ODT-21-89, ODT-021A-89 and ODT-021B-89 and who have not received a refund thereof.

B. To enter an Order against each Defendant requiring each of them to immediately return to each member of the Class Participants the impact fees paid by said Class Participant plus compound interest thereon from the date said impact fees were paid to the Defendants by the Class Participant.

C. To enter an Order against each Defendant requiring each of them to immediately release to the Plaintiff, SUNDANCE, the impact fees paid by the Plaintiff SUNDANCE to the Defendants in the aggregate amount of $63,580.00 and as more particularly set forth in Exhibit B, plus compound interest thereon from the date said impact fees were paid to the Defendants by the Plaintiff, SUNDANCE.

D. For reasonable attorneys fees and costs incurred by, and to be incurred by, the Plaintiffs in prosecuting these claims for refund.

E. For such other and further relief in law and in equity as this Court deems appropriate and just.

COUNT II

DECLARATORY JUDGMENT

19. The Plaintiffs adopt and reallege the allegations of Paragraphs 1 through 14 hereinabove and Paragraphs 16 through 18 hereinabove as Paragraph 19 of Count II.

20. An actual controversy exists between the Plaintiffs and the Defendants as to the return of the impact fees paid by the Plaintiffs to the Defendants during the period from November 22, 1988 through July 25, 1990.

WHEREFORE, the Plaintiff SUNDANCE HOMES, INC., an Illinois corporation individually and on behalf of the Class Participants, respectfully prays this Court as follows:

A. To certify as a class, and as Plaintiffs herein, those individuals and entities who were required to pay or incur an impact fee to the County of DuPage from November 22, 1988 through July 25, 1990, pursuant to DuPage County Ordinances DTO-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 and who have not received a refund thereof.

B. To enter an order declaring that the Defendant, COUNTY OF DU PAGE, is indebted to the Plaintiff, SUNDANCE, in the aggregate amount of $63,580.00 as more specifically set forth in Exhibit C, plus compound interest thereon from the date said impact fees were paid by the Plaintiff, SUNDANCE and for judgment thereon against the Defendant, COUNTY OF DU PAGE, and in favor of the Plaintiff, SUNDANCE, for said amount.

C. To enter an Order declaring that the Defendant, COUNTY OF DU PAGE, is indebted to each Class Participant in the aggregate amount of impact fees paid by each member of said Class to the County of DuPage pursuant to DuPage Ordinance No. DTO-016-88, plus compound interest thereon from the date said impact fees were paid by said Class Participant and for judgment thereon against the Defendant, COUNTY OF DU PAGE, and in favor of the Class Participant.

D. For reasonable attorneys fees and costs incurred by and to be incurred by, the Plaintiffs in prosecuting their claims for refund.

E. For such other and further relief in law and in equity as this Court deems appropriate and just.

COUNT III

RESTITUTION, ASSUMPSIT, UNJUST ENRICHMENT AND RECOVERY OF PAYMENT

21. The Plaintiffs hereby adopt and reallege the allegations of Paragraph Nos. 1 through 13 hereinabove as Paragraphs 20 of Count III.

22. Subsequent to the entry of the above referred to Illinois Supreme Court decision, declaring the enabling act and DuPage County Ordinances DTO-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 to be unconstitutional and ordering a return of the impact fees collected thereunder, the Plaintiff, SUNDANCE, demanded the Defendants to return the impact fees paid to the County of DuPage pursuant to said ordinances in the

aggregate amount of $63,580.00 as set forth in particular in Exhibit B.

23. The Defendants, through the DuPage County States Attorneys' Office, has refused, and continues to refuse, to return the above set forth impact fees as ordered by the Illinois Supreme Court.

24. There is no lawful reason or authority for the Defendants, in their official capacity to retain, and refuse to return, the impact fees paid by the Plaintiffs pursuant to the invalid ordinances, and such delay or refusing to return said impact fees is vexatious in nature.

25. The Defendants unlawfully received money from the Plaintiffs' for impact fees collected pursuant to an invalid county ordinances, [sic] and continues to retain said funds and refuses to return said funds which are contrary to the mandates of equity and justice.

26. The funds being held by the Defendant is the lawful property of the Plaintiffs.

27. The Defendants have been unjustly enriched in an amount of $6,194,056.22, which amount represents the total sum of impact fees paid by Plaintiffs pursuant to the invalid county ordinances, and for which amount rightfully belongs to the Plaintiffs and pursuant to the maxim of equity and good conscience said funds should be returned to the Plaintiffs.

WHEREFORE, the Plaintiff, SUNDANCE HOMES, INC., an Illinois corporation, individually and on behalf of the Class Participants respectfully prays this Court as follows:

A. To certify as a class, and as Plaintiffs herein, those individuals and entities who were required to pay or incur an impact fee to the County of DuPage from November 22, 1988 through July 25, 1990, pursuant to DuPage County Ordinances DTO-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 and who have not.

B. Enter an Order against each Defendant requiring each Defendant to immediately deposit the funds collected, including the impact fees, interest and costs, into a fund for the benefit of the members of the class, or in the alternative, to enter an order against each Defendant requiring each of them to immediately return to each member of the Class Participants the impact fees paid by said Class Participant [sic] plus compound interest thereon from the date said impact fees were paid to the Defendants by the Class Participants.

C. To enter an Order declaring that the Defendant, COUNTY OF DU PAGE, is indebted to each Class Participant in the aggregate amount of impact fees paid by each member of said Class to the County of DuPage pursuant to DuPage Ordinance No. DTO-016-88, ODT-021-89, ODT-021A-89 and ODT-021B-89 plus compound interest thereon from the date said impact fees were paid by said Class Participant and for judgment thereon against the Defendant, COUNTY OF DU PAGE, and in favor of the Class Participant.

D. For reasonable attorneys fees and costs incurred by and to be incurred by, the Plaintiffs in prosecuting their claims for refund.

E. For such other and further relief in law and in equity as this Court deems appropriate and just.

SUNDANCE HOMES, INC.

BY: /s/ Joseph M. Laraia

STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

___ being first duly sworn on oath deposes and states that he is the ___ of the Plaintiff, SUNDANCE HOMES, INC., and as said officer is duly authorized to execute the above and foregoing Amended Complaint for Mandamus, Declaratory Judgment and Restitution, Assumpsit, Unjust Enrichment and Recovery of Payment and states that the facts set forth therein are true and correct.

_____

SUBSCRIBED AND SWORN to
before me this ___ day of ___, 1996.

_____
NOTARY PUBLIC

CERTIFICATE OF ATTORNEY

I certify as attorney of record in this cause, that I have read the above pleading and that to the best of my knowledge, information and belief, formed after reasonable inquiry of my client, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose,

such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

_____

As Attorney and Not Personally

LARAIA & HUBBARD, P.C.
#007
1761 South Naperville Road
Wheaton, Illinois 60187
630-690-6800

APPENDIX I

NO.

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

SUNDANCE HOMES, INC. Plaintiff-Petitioner v. COUNTY OF DU PAGE, body corporate and politic, JOHN LOTUS NOVAK, Treasurer GEORGE KOUBA, Finance Director, DONALD ZILENGA, Director of Transportation Defendants-Respondents	) Petition for Leave to) Appeal from the) Appellate Court of) Illinois, Second District,) No. 2-99-0125)) There heard on Appeal) from the Circuit Court of) the Eighteenth Judicial) Circuit DuPage County,) Illinois)) Honorable) Robert E. Byrne) Judge Presiding)

PETITION FOR LEAVE TO APPEAL

Joseph M. Laraia
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COUNSEL FOR PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

PETITION FOR APPEAL AS A MATTER OF RIGHT

Now comes the Plaintiff-Petitioner, SUNDANCE HOMES, INC., ("SUNDANCE" or "CLASS") individually and as class representative, and pursuant to Supreme Court Rule 317 petitions this Court for leave to appeal as a matter of right or, in the alternative, pursuant to Supreme Court Rule 315, prays this Honorable Court to grant its Petition for Leave to Appeal as a matter of sound judicial discretion and to accept the review of the opinion of the Appellate Court of the Second District filed on November 22, 1999.

STATEMENT OF DATE UPON WHICH THE JUDGMENT WAS ENTERED

The Appellate Court of the Second District filed its opinion on November 22, 1999. The opinion reversed the judgment of the trial court which had been entered in favor of the CLASS and against the Defendant-Respondent, the COUNTY OF DU PAGE ("COUNTY"). The trial court ordered the COUNTY to refund all impact fees collected under an Illinois revenue statute, and under certain DuPage County ordinances, which were declared to be unconstitutional by the Illinois Supreme Court in the case of *Northern Illinois Home Builders Assn. v. County of DuPage,* 165 Ill. 2d 25, decided on March 23, 1995. The CLASS has timely filed its Affidavit of Intent to file its Petition for Leave to Appeal to the Supreme Court with the Appellate Court of the Second District. No Petition for Rehearing was filed. A true and correct copy of the opinion is attached hereto as Ex. A.

POINTS RELIED UPON FOR REVERSAL

I. THE SECOND DISTRICT'S DECISION CONSTITUTES AN UNCONSTITUTIONAL TAKING OF THE PLAINTIFF-PETITIONER CLASS' PROPERTY IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AND ALSO ENTITLES THEM TO A RIGHT OF REVIEW TO THIS COURT AS A MATTER OF RIGHT.

Illinois Supreme Court Rule 317 provides a right of review to this Court when a constitutional question arises for the first time as a result of the action of the Appellate Court. In this case the Illinois Supreme Court, in the *Northern Illinois Home Builders Assn.* case ruled that the same statute and ordinances, under which the subject impact fees were collected, were unconstitutional and found that the payment of said fees was an unconstitutional taking under the Fifth Amendment of the United States Constitution and Section 2 of Article I of the Illinois Constitution of 1970 (Ill. Const. 1970 Art. I, § 2) *Id.* at 35. The Second District Court's decision, which reverses the trial court's ruling to refund the impact fees, constitutes an unconstitutional taking of the taxpayers' property as defined by the Illinois Supreme Court in the *Northern Illinois Home Builders* case. Therefore this case falls squarely within the provisions of Supreme Court Rule 317 and the Plaintiff-Petitioner Class has a right to have this matter reviewed by this Court.

II. THE SECOND DISTRICT'S RULE 23 ORDER IS CONTRARY TO, AND NULLIFIES, THIS COURT'S DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* CASE WHICH DECLARED THE SUBJECT REVENUE STATUTE TO BE UNCONSTITUTIONAL AND ORDERED THAT THE COUNTY OF DU PAGE REFUND THE IMPACT FEES COLLECTED THEREUNDER.

On March 23, 1995 the Supreme Court considered the constitutionality of the very statute and DuPage County ordinances which are the subject of this lawsuit in the *Northern Illinois Home Builders Assn.* case. The Supreme Court ruled that the enabling statute, and DuPage County ordinances, were unconstitutional and ordered that the funds collected thereunder should be refunded. Shortly thereafter, SUNDANCE filed this class action to obtain a refund of the impact fees for itself and all those who paid said fees under the invalid ordinances. The trial court ordered that the funds collected under the invalid ordinances be refunded. The Second District Court reversed the trial court's decision, which decision ignored, and nullified, the Supreme Court's decision in the *Northern Illinois Home Builders* case. The Second District Court accomplished this result by improperly applying a five (5) year Statute of Limitations period to the taxpayers' right to a refund and further by erroneously holding that the Statute of Limitations began to run from the date of the payment of the impact fees rather than from the date the Supreme Court rendered its decision. By improperly applying the Statute of Limitations to the CLASS' claim for a refund, the Second District has effectively nullified the Supreme Court's decision and has

deprived the citizens of their right to the refund ordered by this Court.

III. THE SECOND DISTRICT COURT HAS ERRONEOUSLY APPLIED A FIVE (5) YEAR STATUTE OF LIMITATIONS PERIOD, APPLICABLE TO ACTIONS AT LAW, TO THE PLAINTIFF-PETITIONERS' EQUITABLE CAUSES OF ACTION.

The Plaintiff-Petitioner Class' Complaint is based on the equitable causes of action of Mandamus, to require the County to refund funds wrongfully collected (Count I); Declaratory Judgment, to declare that the taxpayers are entitled to a refund (Count II); and an action for Restitution, Assumpsit and Unjust Enrichment, to restore the parties to the position they were in before the invalid ordinances were enforced. (Count III). The issue of whether the Statute of Limitations applies to these types of actions was considered in two cases which are directly on point; namely, *Ross v. The City of Geneva*, 43 Ill. App. 3d 976, (2nd Dist. 1976) affd. at 71 Ill. 2d 27 (1978), and the *Board of Trustees v. Village of Glen Ellyn*, 337 Ill. App. 183, (2nd Dist. 1949). In both cases the Second District held that equity requires that funds unlawfully collected, or diverted, by a governmental entity should be refunded to the taxpayers who paid them without regard to the Statute of Limitations restrictions applicable to actions at law.

IV. EVEN IF THE FIVE (5) YEAR STATUTE OF LIMITATIONS UNDER § 13-205 WERE APPLICABLE, THE SECOND DISTRICT COURT ERRONEOUSLY DETERMINED THAT THE CAUSE OF ACTION FOR A REFUND BEGAN TO RUN FROM THE DATE THE IMPACT FEES WERE PAID RATHER THAN FROM THE DATE THE ILLINOIS SUPREME COURT RENDERED ITS DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS CASE* THAT CREATED THE RIGHT TO A REFUND.

The Second District Court incorrectly ruled that all claims for a refund of the subject impact fees had to be commenced within five (5) years from the date upon which the impact fees were paid and not from the date the Supreme Court declared the statute, and DuPage County ordinances, to be unconstitutional. The Second District's decision is directly opposed to the *Ross* and *Board of Trustees* cases, referred to above, as well as other case authorities which recognize that a cause of action can be created by a case decision and that the Statute of Limitations, if applicable, begins to run from that date.

V. THE SECOND DISTRICT COURT MISAPPLIED THE DOCTRINE OF *LACHES*.

STATEMENT OF FACTS

This case involves a class action for the refund of impact fees paid from November 22, 1988 through July 25, 1990 under certain DuPage County ordinances (Nos. OTD-016-88; ODT-21-89; ODT-021A-89 and ODT-021B-89). Those ordinances were declared to be invalid when the enabling statute under which they were

enacted, namely, § 5-608 of the Highway Code (Ill. Rev. Stat. Ch. 121, § 5/5-608), was declared to be unconstitutional by the Illinois Supreme Court in the case of *Northern Illinois Home Builders Assn.* case decided on March 23, 1995. The Supreme Court found that the statute, and ordinances, violated the taking clauses of the Fifth Amendment to the United States Constitution and Section 2 of Article I of the Illinois Constitution of 1970 and ordered that the funds collected thereunder be refunded. *Id.* at 35. The pertinent language of that decision is found at Ps35 and 39 wherein the Court stated:

> "In sum, we hold that the first enabling act is constitutionally flawed because of its failure to meet the 'specifically and uniquely attributable' test set forth in *Pioneer Trust*. Consequently, the DuPage County ordinances passed pursuant to the first enabling act are invalid **and the monies collected thereunder should be returned.** (See *Mills v. Peoples Gas Light & Coke Co.* (1927) 327 Ill. 508, 535, 158 N.E. 814 (an unconstitutional act confers no rights, afford no protection, imposes no duties, and is, in legal contemplation, as inoperative as though it had never been passed).) (Emphasis Added). *Id.* at 35.
>
> * * *
>
> In conclusion, we hold that: (1) the first enabling act is unconstitutional; (2) the DuPage County ordinances passed pursuant to the first enabling act are invalid and **the monies collected thereunder should be returned**;" (Emphasis Added) *Id.* at 39.

The amount of the fees collected between November 22, 1988 and July 25, 1990, under the invalid ordinances, was $6,194,056.22.(R. C764,C819)

The Plaintiff-Petitioner, SUNDANCE, was one of the taxpayers who paid the impact fees and filed this class action on February 8, 1996 (R. C1). The trial court denied the COUNTY'S Motion to Dismiss the Class Complaint on the grounds that the class action was barred by the five (5) year Statute of Limitations set forth in Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205) (R. C167) and that the period commenced to run from the date of the payment of the impact fees. (R. C167) The COUNTY also alleged that the action was barred by laches. (R. C168).

The trial court denied the COUNTY'S Motion to Dismiss (R217); certified the class (R. C727-730) and ultimately granted the CLASS' Motion for Summary Judgment, which created a fund of the impact fees collected from which a refund could be made to all of the taxpayers who paid them (R. C1149). The trial Court later ordered that the unclaimed portion of the class fund be used to pay attorneys' fees, costs and other claims and that the balance thereof, in the approximate amount of $3,740,048, be turned over to the COUNTY and that a credit of said amount be provided to all of the DuPage County real property owners so as to reduce the next real estate tax levy and the property owners' next real estate tax bills.(R. C1523-1526) The COUNTY appealed the trial court's decision and the Second District Appellate Court reversed the trial court's decision holding that the class action was barred by the five (5) year Statute of Limitations set forth in § 13-205 of the Illinois Code of Civil

Procedure (735 ILCS 5/13-205) (Ex. A Pg. 16). The Second District Court also ruled that the five (5) year Statute of Limitations period began to run from the date the Class members paid the impact fees and not from the date the Supreme Court decided the *Northern Illinois Home Builders* case. (Ex. A, Pg. 21) The Second District Court also held that the action was barred by laches. (Ex. A, Pg. 24). The decision did not address any of the other issues raised by the COUNTY in its appeal.

The Plaintiff-Petitioner CLASS seeks leave to appeal from the Second District's opinion which reverses the trial court's decision and forever takes away the CLASS' right to a refund as ordered by the trial court and as ordered by the Illinois Supreme Court in the *Northern Illinois Home Builders* decision.

ARGUMENT FOR REVIEW AND REVERSAL

A. BASIS FOR REVIEW AS A MATTER OF RIGHT.

1. THE SECOND DISTRICT'S DECISION CONSTITUTES AN UNCONSTITUTIONAL TAKING AS PRONOUNCED BY THE ILLINOIS SUPREME COURT IN THE *NORTHERN ILLINOIS HOME BUILDERS* CASE.

The members of the CLASS have a right to appeal to this Court under Supreme Court Rule 317 which provides that an appeal will lie, as a matter of right, where a constitutional question arises for the first time in, and as a result of, the action of the Appellate Court. The Second District's opinion, from which this appeal is sought, takes away the CLASS' right to a refund and allows the COUNTY to retain the impact fees which the Illinois

Supreme Court has determined were unlawfully taken in violation of the taxpayers' constitutional rights. The issue of a constitutional taking did not arise in the trial court because the trial court followed the Supreme Court's decision. The constitutional question, and unconstitutional taking, first arose in this case when the Second District Court rendered its decision and denied the class members of their right to a refund. That constituted the unconstitutional taking recognized by the Supreme Court in its earlier decision on the very same point. This case falls squarely within the provisions of Supreme Court Rule 317 and the CLASS is entitled to a review of this case as a matter of right.

II. IN THE ALTERNATIVE: THERE ARE SEVERAL WELL-BASED REASONS WHY THIS COURT SHOULD TAKE THIS CASE UNDER SUP. CT. RULE 315, WHICH INCLUDE THE FOLLOWING:

(a) THE SECOND DISTRICT'S OPINION IS CONTRARY TO, AND NULLIFIES, THE ILLINOIS SUPREME COURT'S DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS* CASE.

It is an unusual situation in which an appellate court decision nullifies the decision of the Illinois Supreme Court on the very same issue and subject matter. That is what has happened here. Not only did the Supreme Court consider the same statute and ordinances, which form the basis of the CLASS' claim for a refund, but, more significantly, the Supreme Court specifically ruled

that the monies collected under the unconstitutional statute and ordinances be refunded. It is interesting to note that the Second District had previously declared the statute to be constitutional, *Northern Illinois Home Builders v. County of DuPage*, 251 Ill. App. 3rd 494, (1993) and that the Supreme Court reversed that decision. By denying the CLASS' right to the refund, which was ordered by the Supreme Court, the Second District has effectively nullified the Supreme Court's decision. The Supreme Court did not limit the refund to the nine Plaintiffs in the *Northern Illinois Home Builders* case but specifically indicated, in two separate places of its decision, that "the monies collected thereunder should be returned." 165 Ill. 2d at 35, 39.

Not only is the controlling pronouncement by the Illinois Supreme Court a sufficient basis for reversing the Second District's decision but it is also a significant consideration for this Court in deciding to accept this case so the Court can enforce compliance with its prior decision.

(2) THE SECOND DISTRICT'S OPINION IS OF CONSIDERABLE GENERAL IMPORTANCE BECAUSE OF (1) THE AMOUNT OF THE REFUND INVOLVED, (2) THE NUMBER OF PARCELS AND NUMBER OF INDIVIDUALS AFFECTED, (3) THE DANGEROUS PRECEDENCE CREATED BY THE DECISION AND (4) THE NEED TO CLARIFY THE LAW ON A CITIZEN'S RIGHT TO A REFUND.

The amount of the fees collected under the subject ordinances is in the amount of $6,194,056.22. (R. C764). The number of separate parcels of property involved is

5200. (R. C1589) The Second District's decision also involves all of the real estate property owners of DuPage County since they would receive a tax reduction on their next real estate tax bills. (R. C1523-1526). It is respectfully submitted that these facts alone are significant enough to establish the general importance of this case. However, of even greater significance is the effect that this decision will have in preventing and discouraging others from filing actions for a refund of taxes or fees paid under a statute or ordinance that is later declared to be unconstitutional if more than five (5) years had passed from the date they paid the unlawful fee or tax. To deny a refund to all those affected by the unconstitutional taking, who had not previously filed an action for a refund, would ignore the effect of the Illinois Supreme Court decisions which declare statutes and ordinances to be unconstitutional and create the right to a refund.

The Second District's opinion herein could also have the effect of encouraging government officials to enact an arguably unconstitutional statute or ordinance with a reasonable degree of comfort that, if it is later determined to be unconstitutional, they will only have to refund a limited amount of the taxes or fees collected thereunder to those few with the financial resources sufficient to file an action for a refund and pursue their rights to the Illinois Supreme Court, a process which, as here, can consume the full five (5) year limitation period imposed by the Second District Court herein. In this case, the Illinois Supreme Court said that the statute and ordinances were unconstitutional and that the money should be refunded to the citizens. The Appellate District Court has found a way to allow the COUNTY to retain the

funds. To allow this decision to stand would create a dangerous and unjust precedent.

Also this Court should decide, once and for all, whether the Statute of Limitations applies to actions for the refund of fees and taxes paid under unconstitutionally declared revenue statutes or ordinances and, if applicable, whether the time period begins to run from the date of the payment of the fee or tax or from the date the Court of final review declares the statute or ordinance to be unconstitutional. That issue has not been resolved in the law.

(c) THE SECOND DISTRICT'S OPINION IS IN CONFLICT WITH TWO OTHER DECISIONS OF THE SECOND DISTRICT; NAMELY *ROSS V. CITY OF GENEVA*, and *BOARD OF TRUSTEES OF POLICE AND PENSION FUND V. GLEN ELLYN*, AND THE CONFLICT SHOULD BE ADDRESSED AND RESOLVED BY THIS COURT.

As stated hereinabove, the Second District's opinion is inopposite to the Second District's holdings in *Ross v. City of Geneva*, 43 Ill. App.3d 976 and *Board of Trustees v. Glen Ellyn*, 337 Ill. App.183 which both held that the taxpayers were entitled to a refund, regardless of the time that had transpired between the payment of the fees and the filing of the action to obtain a refund thereof. The time period involved in those cases was 13 years and 16 years. The Courts therein rejected the Statute of Limitations defense adopted by this Second District Court in this case.

The Second District adopted the 1917 First District decision of *Rath v City of Chicago,* 207 Ill. App. 177 in which the Court held that the Statute of Limitations began to run from the time the Plaintiff filed his application for a gun license permit and paid the fee and not from the date the ordinance was declared unconstitutional.

It is respectfully submitted that there is a conflict between the decision of the Second District herein and the Second District Court's holdings in the *Ross* and *Board of Trustees* cases as to whether a Statute of Limitations applies to a claim for a tax refund when the period commences to run, which issues should be resolved by this Court.

(d) THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO ENFORCE ITS DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS* CASE,

As stated hereinabove, this Court dealt with the same enabling statute and County ordinances when it decided the *The Northern Illinois Home Builders* case and certainly would have been mindful of the fact that almost all of the impact fees paid between November 22, 1988 and July 25, 1990 had been paid more than five (5) years prior to the time it rendered its decision on March 23, 1995. Nonetheless, the Supreme Court stated, twice in its decision, that the monies collected under the DuPage County ordinances "should be returned". It is therefore respectfully submitted that this Court should exercise its supervisory authority to compel compliance with its prior ruling so

that the funds which it ordered to be refunded will be refunded.

(5). THE SECOND DISTRICT'S OPINION IS FINAL IN CHARACTER.

The Second District's opinion outright reverses the trial court's judgment which had awarded a refund of the $6,194,056.22 plus interest to the citizens of DuPage County and sealed the CLASS' right to any refund forever. Also, if allowed to stand, the decision establishes a dangerous precedent concerning the recovery of monies paid under unconstitutional revenue statutes.

It is hereby respectfully submitted, that from the above considerations, the Plaintiff-Petitioner Class has a right to an appeal to this Court under Supreme Court Rule 317 and, in the alternative, that there are sufficient reasons for this Court to accept this case as a matter of sound discretion under Supreme Court Rule 315 so that this Court can consider the reversal of the decision of the Second District herein.

B. ARGUMENT ON THE POINTS RELIED UPON FOR REVERSAL.

I. THE SECOND DISTRICT'S DECISION CONSTITUTES AN UNCONSTITUTIONAL TAKING OF THE PLAINTIFF-PETITIONER CLASS' PROPERTY IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

The Supreme Court, in the *Northern Illinois Home Builders* case, found that the subject statute and ordinances were unconstitutional in that they allowed the

funds to be used in areas outside of the district which was impacted by the additional traffic generated by the taxpayer's project or home improvement. As a result, the party paying the fee did not receive a direct and material benefit from the improvement financed by the fee which he or she was required to pay. The Supreme Court held that this was an unconstitutional taking. Therefore, any action which prevents the refund of said impact fees to the parties who paid them perfects an unlawful taking. That constitutional issue did not arise again until the Second District Court reversed the trial court's decision to refund the monies collected. The violation of the CLASS' constitutional rights therefore only arose again when the Second District Court erroneously applied a Statute of Limitations bar to the Class members' right to a refund. If allowed to stand, the Second District Court's decision forever seals the unlawful taking of the CLASS' funds and constitutes an unlawful taking of their property without due process of law. This violation entitles the Plaintiff-Petitioner CLASS to a review of this case by this Court as a matter of right under Sup. Ct. Rule 317.

II. THE SECOND DISTRICT'S RULE 23 ORDER IS CONTRARY TO, AND NULLIFIES, THIS COURT'S DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* CASE WHICH DECLARED THE SUBJECT REVENUE STATUTE TO BE UNCONSTITUTIONAL AND ORDERED THAT THE COUNTY OF DU PAGE REFUND THE IMPACT FEES COLLECTED THEREUNDER.

As stated hereinabove, the Illinois Supreme Court had before it the very same statute and ordinances which

are the subject of this litigation when it considered the *Northern Illinois Home Builders* case. In that case the suit was brought by nine home builders for their own benefit. The Supreme Court reversed the Second District's decision, which had upheld the constitutionality of the subject statute and ordinances. This Court was unequivocal in its pronouncement that the monies collected under the invalid ordinances were to be refunded and did not limit the effect of its ruling only to the Plaintiffs in that action. If the five (5) year Statute of Limitations, relied upon by the Second District Court, was applicable to this case, the Supreme Court would have recognized that fact and certainly would not have ordered that "the monies collected thereunder should be returned". Simply stated, the Second District's decision defeats the refund which this Court ordered and nullifies the pronouncements of this Court. The Second District's decision should therefore be reversed on this basis alone.

III. THE SECOND DISTRICT COURT ERRONEOUSLY APPLIED A FIVE (5) YEAR STATUTE OF LIMITATIONS PERIOD, APPLICABLE TO ACTIONS AT LAW, TO THE PLAINTIFF-PETITIONER'S EQUITABLE CAUSES OF ACTION.

Actions in equity are not governed by the Statute of Limitations provisions of § 13-205 of the Code of Civil Procedure (735 ILCS 735 § 13/205), *Meyers v. Kissner*, 149 Ill. 2d 1 (1992). The actions of Mandamus; Declaratory Judgment; Restitution; Assumpsit and Unjust Enrichment, plead [sic] by the CLASS herein, are governed by equitable principals. *Thomas v. Village of Westchester*, 132 Ill. App. 3d 190 (1st Dist. 1985) (a Mandamus Action);

Skipka v. Inserra, 211 Ill. App. 3d 735 (1st Dist. 1991) and *Ross v. Geneva,* 71 Ill. 2d 27 (1978) (Declaratory Judgment cases); *Cangas v. Marcus Auto Lease Corporation,* 176 Ill. app. 3d 127 (1st Dist. 1988) (a Restitution and Unjust Enrichment case) and *Board of Highway Commissioners v. City of Bloomington,* 253 Ill. 164 (1911) (an Assumpsit case).

As set forth hereinabove, the two principal cases which are determinative of this case, include *Ross v. The City of Geneva,* 43 Ill.App. 3d 976 (2nd Dist. 1976) affd. at 71 Ill. 2d 27 and the *Board of Trustees v. Village of Glen Ellyn, 337 Ill. App. 183* (2nd Dist 1949). Both cases hold that a governmental entity is not entitled to retain funds collected under an unconstitutional statute or ordinance or which are unlawfully diverted from the use for which they were collected and that the five (5) year Statute of Limitations does not apply to defeat a claim for a refund. Those cases held that equity requires that the funds be refunded regardless of the time that had expired between the collection of the tax and the institution of the action to recover the refund.

In the *Ross* case, the Village of Geneva had passed an unconstitutional ordinance that imposed a parking surcharge upon the electric bills of the commercial accounts of the Village. The trial and Appellate Courts found that the ordinance was unconstitutional and ordered that the funds, collected during the 13 year period in which the ordinance was in existence, be refunded. The Village attempted to interpose the defense of the five (5) year Statute of Limitations. The Court stated:

> "This complaint was filed seeking equitable relief – the imposition of a constructive trust on, and the restitution of, funds collected without statutory authority over a period of 13 years. Equity requires the return of money rightfully belonging to another [cite omitted], and this court will not sanction the nullification of equitable doctrines by close conceptual reasoning. [cites omitted] To do equity in this case requires the restitution of all parking surcharge monies collected over the 13 years under the subject ordinance." 43 Ill. App. 3d at 985.

With reference to the defense of laches, the Supreme Court ruled:

> " . . . there is no showing that Defendant is prejudiced by the fact that the ordinance was not attacked until 13 years after its enactment. We hold that *laches* does not ban Plaintiffs' action." *Ross v. City of Geneva,* 71 Ill. 2d 27, 34 (1978)

The second case, which is also right on point, is *Board of Trustees v. Village of Glen Ellyn, supra.* In that case the Village of Glen Ellyn ignored the state statute which required municipalities of more than 5,000 citizens to create a police pension board and pension fund. Sixteen (16) years after the Village reached the 5,000 mark it finally created the required pension board and pension fund but had used the license fees and fines, that should have been turned over to the pension fund, for other purposes. The Village tried to invoke the Statute of Limitations to defeat the pension board's claim that all of the funds that should have been deposited in the pension fund be paid to said fund. The Second District rejected the Village's position and held that all funds collected

during the subject 16 years period should be turned over. The Court stated at P194:

> "(4) It is an elemental principle of law, applied in both law and equity courts, that where one person has received money or its equivalent, which belongs to another, under such circumstances that in equity and good conscience he ought not to retain it, recovery will be allowed. (Cites Omitted)
>
> * * *
>
> "[11] Nor can the statute of limitations be invoked to defeat plaintiffs' right to assert the cause of action, since defendant's wrongful act prevented the creation of a proper legal entity to protect and supervise the pension fund until 1946. This court will not sanction the nullification of equitable doctrines by close conceptual reasoning, and it is our opinion that the plaintiff board is a proper part to being this suit. Therefore, the circuit court committed no error in entering judgment for the percentage of the revenues designated by the statute which defendant failed to allocate to the fund and diverted to its own use from 1931 to 1945." *Id.* at 198.

In opposition to the *Ross* and *Board of Trustees* cases, which are directly on point, the Second District Court herein adopted the holding in the 1917 First District case of *Rath v. City of Chicago*, 207 Ill. App. 177 (1st Dist 1917), which devoted one paragraph to the Statute of Limitations issue. That case never considered the equitable principals discussed in the *Ross* and *Board of Trustees* cases or raised by the CLASS herein. In *Rath* the Plaintiff filed a claim for a refund of a gun license fee which he had paid under an ordinance which was later determined to be

unconstitutional. The Plaintiff alleged that his claim for a refund was based on a written contract cause of action that was controlled by the ten (10) year Statute of Limitations. He claimed that the application for the gun permit was the written agreement. The Court disagreed and applied the five (5) year Statute of Limitations suggested by the City. *Id.* at 121.

The Second District Court herein also referred to its recent case decision in *Raintree Homes v. Village of Kildeer,* 302 Ill. App. 3d 304 (2nd Dist 1999) (Ex A, Pgs 12 and 15) as authority that the five (5) year Statute of Limitations period applies to actions for a refund of an impact fee; however, the Court ignored the fact that that case only involved the issue of whether the one (1) year statute under the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-101) applied or whether the five (5) year limitations period of § 13-205 applied. The Court therein held that an action for a refund of fees paid to a governmental entity was not a tort action and that the five (5) year, rather than the one (1) year statute applied. *Id.* at 307. The Court never addressed the issue of whether the Statute of Limitations applied to equitable causes of action nor did have before it the issue of whether the causes of action accrued from the date of payment of the fees or from the date a Court declares the revenue statute to be unconstitutional.

It is respectfully submitted that the Second District Court herein is in clear error in disregarding the *Ross* and *Board of Trustees* decisions and by applying a Statute of Limitations provision, applicable to actions at law, to the equitable causes of action plead [sic] herein.

III. EVEN IF THE FIVE (5) YEAR STATUTE OF LIMITATIONS PERIOD UNDER § 13-205 WERE APPLICABLE, THE SECOND DISTRICT ERRONEOUSLY DETERMINED THAT THE CAUSE OF ACTION FOR A REFUND BEGAN TO RUN FROM THE DATE THE IMPACT FEES WERE PAID RATHER THAN FROM THE DATE THE ILLINOIS SUPREME COURT RENDERED ITS DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* CASE THAT CREATED THE RIGHT TO A REFUND.

The Second District Court acknowledged that a cause of action can be created by a case decision but held that the Illinois Supreme Court did not create the right to a refund when it declared the subject statute and ordinances to be unconstitutional. (Ex. A Pg. 18). It is difficult to understand the Court's reasoning for this pronouncement since up until the Supreme Court rendered its decision the right to a refund was nonexistent because the trial and appellate courts had previously ruled that the same statute and ordinances were constitutional and that the taxpayers were not entitled to a refund. The Supreme Court decision clearly created the right to a refund which was non existent before its ruling on March 23, 1995 and changed the law applicable to the subject claims for a refund.

In *People, ex rel. Foreman v. Village of Round Lake Park,* (2nd Dist. 1988) 171 Ill. App. 3d 443 (2nd Dist., 1988), the Second District acknowledged that a case decision, which changes the law, can create a cause of action for purposes of the Statute of Limitations. This Second District's decision misidentifies the case decision which changed the law and created the subject CLASS' right to a refund

herein. The Court, at P18 of its decision, incorrectly found that the right to a refund was created by the decisions which established the constitutional standard that there be a direct and material benefit to the parties who paid the impact fee; namely, the cases of *Krughoff v. City of Naperville*, 68 Ill. 2d 352 (1977) and *Pioneer Trust & Savings Bank v. Village of Mt. Prospect*, 2 Ill. 2d 375 (1961) rather than the *Northern Illinois Home Builders Assn.* case which interpreted the subject impact fee statute and DuPage County ordinances and found them to be unconstitutional. (Ex. A Pg.18) Simply stated, the right to a refund was created by the Illinois Supreme Court on March 23, 1995 in the *Northern Illinois Home Builders* case and not by the other cases which merely set forth the general principal of law.

In this case the law, up until March 23, 1995, was that the subject Highway Code and DuPage County ordinances, were constitutional. Had a suit been filed between the Second District Court's decision upholding the statute in 1993 and the Illinois Supreme Court's decision on March 23, 1995, said action would have been dismissed and the Plaintiffs therein would have been subject to attorneys' fees and costs for bringing a complaint for a refund on the heels of a decision that was right on point and which had recently upheld the constitutionality of the same statute and ordinances in question.

The Second District Court's holding herein is also opposed to the well reasoned decision of *Owens v. Floyd County*, 94 Ga. App. 532, (Ga. App. 1956) which involved a revenue statute and the precise issue before this Court. The Court held that the cause of action for a taxpayer

refund began to run from the date the court rendered its decision that the revenue statute was unconstitutional.

Another similar case is *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (No. Carolina Sup. Ct. 1984). In that case, a court decision had changed the law pertaining to the right to bring an action for loss of consortium in a medical malpractice situation. The North Carolina Supreme Court decided that the Statute of Limitations began to run from the date of the decision, which changed the law, rather than from the date of the doctor's negligence.

The Second District's opinion herein is also contrary to the Federal Court decisions of *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F. 2d 1353 (5th Cir. 1972) and *Neely v. United States*, 546 F. 2d 1059, (3rd Cir. 1976). In those cases the Courts found that the criminal defendants, whose property had been forfeited as a result of their gambling convictions, were entitled to have the forfeitures vacated and the value of the property taken thereunder refunded because their convictions had been based on illegally obtained confessions. The subject Federal decisions found that there had been a change in the law created by the U.S. Supreme Court decisions of *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.E. 2d 889 (1968) and *Grosso v. United States Coin & Currency*, 390 U.S. 62, 88 S. Ct. 708, 19 L.Ed. 2d 906 (1968) which cases held that a self-incrimination violation which leads to a conviction for the offense that caused the forfeiture of the Defendant's property is a complete basis to vacate the forfeiture. The Courts recognized that the U.S. Supreme Court decisions changed the law and created a new right to contest the forfeiture despite the fact that many years had elapsed since the property was forfeited.

The Courts rejected the prosecution's argument that the action was barred by the Statute of Limitations and that the statute began to run from the date of the forfeiture rather than from the time the U.S. Supreme Court addressed the issue in the *Marchetti* and *Grosso* cases. The above Federal decisions are consistent with the holdings in the *Ross* and *Board of Trustees* cases and should be the law of this case.

Simply stated, the Second District Court's opinion herein, concerning the Statute of Limitations, is directly opposed to its prior decisions in the *Ross* and *Board of Trustees* cases and the other decisions cited herein; is inconsistent with this Court's decision to provide these taxpayers with a refund and is completely inequitable. It is therefore respectfully submitted that this issue should be addressed by this Court and that the opinion of the Second District Court herein should be reversed.

V. THE SECOND DISTRICT COURT MISAPPLIED THE DOCTRINE OF *LACHES*.

The Second District Court misapplied the doctrine of laches and incorrectly found that the payment of the impact fees by the Class representative SUNDANCE was an indication of an "intent to challenge the constitutionality of the enabling act and the ordinances" (Ex. A, Pg.23) and that SUNDANCE'S failure to pursue the challenge of the constitutionality of the subject statute and ordinances constitutes a lack of diligence. The Court ignored the fact, and argument, that during the period of time in question the constitutionality of the same statute

and ordinances was being contested in the *Northern Illinois Home Builders* case and that by 1993, still within the five (5) year period now applied herein by the Second District in its decision, there had been a determination that the subject statute and ordinances *were* constitutional. The Plaintiff-Petitioner SUNDANCE and the CLASS cannot be charged with a lack of diligence in not filing an action when the constitutional question was being litigated or in not filing an action after the Second District had ruled that the ordinances were constitutional and therefore no one was entitled to a refund. Respectfully, the Second District mistakenly confuses the opportunity to contest the constitutionality of a statute with the time upon which an action for a refund of a fee declared to be unconstitutionally collected begins to run.

Also the Second District's decision is incorrect in finding that the COUNTY was prejudiced by the delay in filing this suit because the COUNTY had spent the money. There was no showing when, where, how or why the COUNTY spent the money or how the filing of this action would have prevented the COUNTY from spending the money. Surely the filing of the *Northern Illinois Home Builders Assn.* case did not prevent the spending. The COUNTY could not cite any authority that supports the Second District's holding that the mere spending of unlawfully collected funds establishes prejudice to the governmental entity that spent them. The cases of *Ross v. City of Geneva, supra,* and *DeBruyn v. Elrod,* 84 Ill. 2d 128 (1981) speak to the contrary. Respectfully, the Court was incorrect in its application of the doctrine of laches.

CONCLUSION

WHEREFORE, for the reasons set forth hereinabove, the Plaintiff-Petitioner Class respectfully prays this Honorable Court to grant it leave to appeal to this Court from the Appellate Court decision as a matter of right under Supreme Court Rule 317, or in the alternative, that the CLASS be allowed to appeal to this Count [sic] under Supreme Court Rule 315 and that upon acceptance and determination of this case, that this Court reverse the decision of the Second District Appellate Court and affirm the decision of the trial court.

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APPENDIX J

NOS. 88763 & 88764 Consolidated

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

SUNDANCE HOMES, INC., etc. et al. Plaintiff-Petitioner v. COUNTY OF DU PAGE, body corporate and politic, etc. et al. Defendants-Respondents	Petition from the Appellate Court of Illinois, Second District No. 2-99-0125 Appeal from the Circuit Court of the Eighteenth Judicial Circuit DuPage County, Illinois No. 96 MR 101 Honorable Robert E. Byrne Judge Presiding

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BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

This is a class action brought by Sundance Homes, Inc. ("SUNDANCE") on behalf of itself and others similarly situated (the CLASS) to obtain a refund of impact fees paid under certain impact fee ordinances which were declared to be unconstitutional in an independent proceeding entitled *Northern Illinois Home Builders Assn v. County of DuPage*, 165 Ill. 2d 25, 649 N.E. 2d 384 (1995).

The trial court rejected the COUNTY'S Motion to Dismiss, which was based upon the statute of limitations and laches; certified the class and granted the Plaintiffs CLASS' Motion for Summary Judgment. The Court ordered the impact fees, in the amount of $6,194,056.22, be refunded to those class members who processed claims for a refund and that the unclaimed portion of the fund be used to pay the CLASS' attorneys fees and costs, and disputed claims; that $68,000 be returned to the COUNTY to pay possible future claims of those who opted out of the class and that the balance be applied against the next real estate tax levy to provide a credit to the real estate taxpayers of DuPage County.

The COUNTY appealed the trial court's decision and the Appellate Court reversed the trial court's ruling holding that the Plaintiff CLASS' action was barred by the statute of limitations and by the doctrine of laches. The Appellate Court did not address the other issues raised by the COUNTY which included the award of prejudgment interest; the award of the Plaintiff CLASS' attorneys fees and the disposition of the unclaimed portion of the Class Fund. The CLASS appeals the Second District Court's dismissal of the case.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE SECOND DISTRICT COURT'S DECISION TO BAR THE PLAINTIFF CLASS FROM RECOVERING A REFUND OF FEES PAID UNDER AN UNCONSTITUTIONAL STATUTE AND INVALID ORDINANCES IS AN UNCONSTITUTIONAL TAKING OF THE CLASS MEMBERS' MONEY WITHOUT DUE PROCESS OF LAW.

II. WHETHER THE SECOND DISTRICT COURT'S DECISION TO BAR THE PLAINTIFF CLASS FROM RECOVERING A REFUND IS CONTRARY TO, AND NULLIFIES, THIS COURT'S RULING IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* DECISION WHICH DECLARED THE SUBJECT HIGHWAY CODE PROVISION AND THE RELATED DU PAGE COUNTY ORDINANCES TO BE UNCONSTITUTIONAL AND WHICH ORDERED THE COUNTY OF DU PAGE TO REFUND THE IMPACT FEES COLLECTED THEREUNDER.

III. WHETHER THE SECOND DISTRICT COURT WAS IN ERROR IN ITS APPLICATION OF THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF LACHES TO THIS CASE.

A. WHETHER THE SECOND DISTRICT COURT IS IN ERROR IN APPLYING THE FIVE (5) YEAR STATUTE OF LIMITATIONS UNDER §13-205 OF THE CODE OF CIVIL PROCEDURE (735 ILCS 5/13-205) TO THE EQUITABLE CAUSES OF ACTION PLED BY THE PLAINTIFF CLASS FOR A REFUND OF IMPACT FEES COLLECTED UNDER AN UNCONSTITUTIONAL STATUTE AND ORDINANCES.

B. WHETHER THE SECOND DISTRICT COURT WAS NOT ONLY IN ERROR IN APPLYING A STATUTE OF LIMITATIONS PERIOD TO THIS CASE BUT WAS ADDITIONALLY IN ERROR IN DETERMINING THAT THE CAUSE OF ACTION FOR A REFUND BEGAN TO RUN FROM THE DATE THE IMPACT FEES WERE PAID RATHER THAN FROM THE DATE THE ILLINOIS SUPREME COURT RENDERED ITS DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* CASE WHICH DECLARED THE HIGHWAY CODE PROVISION AND DU PAGE COUNTY ORDINANCES TO BE UNCONSTITUTIONAL AND CREATED THE RIGHT TO A REFUND.

C. WHETHER THE SECOND DISTRICT COURT WAS IN ERROR IN ITS APPLICATION OF THE DOCTRINE OF LACHES TO BAR THE PLAINTIFF CLASS' RIGHT TO A REFUND.

JURISDICTION

This is an appeal from the decision of the Appellate Court of the Second District which was filed on November 22, 1999 and which reversed the judgment of the Circuit Court of DuPage County. The Plaintiff CLASS thereafter filed their Amended Affidavit of Intent to File a Petition for Leave to Appeal to the Supreme Court on December 13, 1999 which was filed pursuant to Illinois Supreme Court Rules 315 and 317. The Plaintiff CLASS thereafter filed their Petition for Leave to Appeal on December 27, 1999 and on April 5, 2000 the Supreme Court granted the Plaintiff CLASS' Petition for Leave to Appeal. On April 14, 2000 the Plaintiff CLASS filed their Notice of Intent to file an additional brief and are filing herewith their brief in support of their appeal to review the decision of the Second District Appellate Court herein.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

CONSTITUTION OF THE STATE OF ILLINOIS

Article I, Section 2

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

STATEMENT OF FACTS

This case involves a class action suit for the refund of impact fees paid to the County of DuPage by numerous property owners from November 22, 1988 through July 25, 1990. The impact fees were collected under certain DuPage County ordinances (Nos. OTD-016-88; ODT-21-89; ODT-021A-89 and ODT-021B-89) which were declared to be invalid when the enabling statute under which they were enacted, namely, §5-608 of the Highway Code (Ill. Rev. Stat. Ch. 121, §5/5-608) was declared to be unconstitutional. The Illinois Supreme Court made that determination on March 23, 1995 in the case of *Northern Illinois Home Builders Assn., et al v. The County of DuPage*, 165 Ill. 2d 25. In that case the Illinois Supreme Court found that the above cited provision of the Highway Code, and the subject DuPage County ordinances passed pursuant to said enabling enactment, violated the due process provisions of the Fifth Amendment to the United States Constitution and Art. I, Section 2 of the Illinois Constitution of 1970. The Supreme Court ordered that the funds collected thereunder be returned. The pertinent

language of the Supreme Court's decision is found at Ps 35 and 39, wherein this Court stated:

> "In sum, we hold that the first enabling act is constitutionally flawed because of its failure to meet the 'specifically and uniquely attributable' test set forth in *Pioneer Trust*. Consequently, the DuPage County ordinances passed pursuant to the first enabling act are invalid **and the monies collected thereunder should be returned.** (See *Mills v. Peoples Gas Light & Coke Co.* (1927) 327 Ill. 508, 535, 158 N.E. 814 (an unconstitutional act confers no rights, afford no protection, imposes no duties, and is, in legal contemplation, as inoperative as though it had never been passed).) (Emphasis Added). *Id.* at 35.
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> In conclusion, we hold that: (1) the first enabling act is unconstitutional; (2) the DuPage County ordinances passed pursuant to the first enabling act are invalid and **the monies collected thereunder should be returned**;" (Emphasis Added) *Id.* at 39.

The amount of the fees collected between November 22, 1988 and July 25, 1990, pursuant to the invalid ordinances, was $6,194,056.22 (C450, C764-C819).

The Plaintiff, SUNDANCE HOMES, INCORPORATED (SUNDANCE), was one of the taxpayers who paid the impact fees under the unconstitutional ordinances. On February 8, 1996 (R.C1) SUNDANCE filed this class action on behalf of itself and all those who paid said impact fees (The "CLASS"). The Defendants, include the County of DuPage and certain of its officials who were

charged with collecting the impact fees. (The "COUNTY")

The COUNTY filed a Motion to Dismiss the CLASS' Complaint on the basis that the class action was barred by the five (5) year statute of limitations set forth in Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205) (R. C167). The COUNTY argued that the statute of limitations commenced to run from the date each of the taxpayers paid their respective impact fees and not from the date the Illinois Supreme Court declared the Highway Code provision and DuPage County ordinances to be unconstitutional. (R. C167) The COUNTY also argued that the action was barred by the doctrine of laches. (R. C168).

The trial court denied the COUNTY'S Motion to Dismiss (R. C217); certified the CLASS (R. C727-730) and ultimately granted the CLASS' Motion for Summary Judgment. (R. C1149). This created a Class fund which consisted of all of the impact fees collected under the unconstitutional Highway Code provision and the invalid DuPage County ordinances. The trial court confirmed the Class fund to be in the amount of $6,194,056.22, which was the amount collected, and ordered that the COUNTY pay interest on said amount from the date of the filing of the subject Class Action, which was on February 8, 1996. (R. C1149).

The trial Court approved a procedure for providing notice to the Class members and a procedure by which the members could present claims for their respective refunds. (R. C127). After the period expired for the class members to present their claims, an accounting was made

to the trial Court by the CLASS' attorneys which included the number of claims filed and the aggregate amount of the claims which were made as well as the amount of the remaining unclaimed portion of the fund. (R. C1455-1513). The Court ordered that the unclaimed portion of the Class Fund be used to pay the CLASS' attorneys' fees, costs and other claims and that the balance of the unclaimed portion be applied toward the next DuPage County real estate tax levy so as to reduce the amount needed from the real estate taxpayers which would provide said taxpayers with a tax benefit by reducing their next real estate tax bills. (R. C1523-1526).

The COUNTY appealed the trial Court's decision and the Second District Appellate Court reversed the trial court's decision holding that the class action was barred by the five (5) year statute of limitations provisions of § 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205) (Separate Appendix, Pg A16). The Second District Court also ruled that the five (5) year statute of limitations period began to run from the date the CLASS members paid their respective impact fees and not from the date the Illinois Supreme Court rendered its decision in the *Northern Illinois Home Builders Assn.* case (Separate Appendix, Pg A18-A20) The Second District Court also held that the action was barred by laches. (Separate Appendix, Pg A22).

The Second District Court's decision did not address any of the other issues raised by the COUNTY in its appeal, which included the award of prejudgment interest; the award of the CLASS' attorney's fees and the disposition of the unclaimed portion of the Class fund.

The Plaintiff CLASS brings this appeal to reverse the Second District Court of Appeals' decision and to affirm the trial court's decision to refund the impact fees which were unlawfully collected under the unconstitutional Highway Code provision and the invalid DuPage County ordinances in question, as was ordered by the Illinois Supreme Court in the *Northern Illinois Home Builders Assn.* decision, and to remand this case back to the Second Appellate District to determine the unresolved issues raised by the COUNTY'S appeal.

ARGUMENT

I. THE SECOND DISTRICT COURT'S DECISION TO BAR THE PLAINTIFF CLASS FROM RECOVERING A REFUND OF IMPACT FEES PAID UNDER AN UNCONSTITUTIONAL STATUTE AND INVALID ORDINANCES IS AN UNCONSTITUTIONAL TAKING OF THE CLASS MEMBERS' MONEY WITHOUT DUE PROCESS OF LAW.

Standard of Review

The first point involves a constitutional issue and arises out of the ruling by the Second District Court's decision to bar a refund of the taxpayers. This did not arise in the trial court because the trial court ordered the refund to be made. Nonetheless, the determination of this issue, which involves a constitutional question and an issue of law, is a *de novo* review. *In re Barbara,* 288 Ill. App. 3d 360 (1997) and *Illinois Health Insurance Guaranty Assn. v. Boozell,* 289 Ill. App. 3d 621 (1997).

ARGUMENT

In the *Northern Illinois Home Builders Assn.* case, 165 Ill. 2d 25 (1995) this Court found that the enabling statute; namely, § 5-608 of the Highway Code (Ill. Rev. Stat. Ch. 121, § 515-608) under which the subject DuPage County ordinances were passed, was constitutionally flawed because said statutory provision, and the ordinances adopted thereunder, allowed the funds collected in one district to be used in areas outside of that district to improve roadways that were not impacted by the taxpayer's development of his property. As a result, the party paying the fee did not receive a direct and material benefit from the improvement financed by the fee which he was required to pay. The Illinois Supreme Court made the statements set forth above in the Statement of Facts which clearly pronounced that the Highway Code provision and the DuPage County ordinances were unconstitutional and that, as such, were "as inoperative as though it had never been passed." *Id.* at 35. Twice in the decision this Court made the statement that "the monies collected thereunder should be returned." Id. at 35 and 39. The Supreme Court did not limit the right to a refund only to the Plaintiffs in the *Northern Illinois Home Builders Assn* litigation but applied its ruling to all of those who were required to pay impact fees under said invalid ordinances.

The Second District Court's decision, from which this appeal is being taken, bars the citizens who paid the subject impact fees from obtaining a refund of unlawfully collected monies. This amounts to an unlawful taking of said taxpayers' money without due process of law.

The law is clear, that the unlawful taxation of, or the imposition of fees upon, citizens by the government, be it the Federal, State or local entity, is the taking of said citizens' property without due process of law. This right is protected under the Fifth Amendment of the Federal Constitution and Article I, Sec. 2 of the Illinois Constitution of 1970. This Court has recited this same rule in numerous cases involving various types of revenue statutes which, for various reasons, were declared to be violative of the constitutional parameters within which government can tax its citizens.

In *Boynton v. Kusper*, 112 Ill. 2d 356 (1986) certain individuals, who applied for, and obtained, marriage licenses brought a class action to declare the marriage license statute to be unconstitutional on the basis that the fee which was being imposed upon them was to pay for a general welfare program. The Court struck down the statute which ordered the county clerks, in counties with a population exceeding one million people, were to pay $10 of the $25 marriage license fee into a Domestic Violence Shelter and Service Fund. The Supreme Court found the statute to be unconstitutional and based its decision on the fact that the fee bore no rational relationship to the county clerk's service in issuing, sealing, filing or recording the marriage licenses and as such the portion of the fee that was intended to be diverted to the establishment and management of shelters for victims of domestic violence was not a fee but a tax. *Id.* at 368. The Court also agreed that the imposition of a tax on a limited group to pay for a general public purpose was a violation of the citizens' due process rights.

In the *Boynton* case, the Illinois Supreme Court cited the U.S. Supreme Court case of *Pennsylvania Coal Co. v. Mabon*, 260 U.S. 393, 416, 43 S. Ct. 158, 160, 67 L.Ed. 322, 326 (1922) wherein the Court stated at P362, that: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The Courts have made it clear that the good intentions of the government in creating an unconstitutional tax or fee is irrelevant to the constitutionality of the statute and that the safeguards of due process require the government to adhere to the constitutional limitations in enacting revenue statutes that impose a tax or fee upon its citizens.

In *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375 (1961), the case cited by this Court in the *Northern Illinois Home Builders Assn.* decision, this Court enunciated the general due process principle that was used to strike down the subject impact fee statute and ordinances. In the *Pioneer Trust* case, this Court declared that the extraction of property, or funds, from a developer must be "specifically and uniquely attributable" to the impact on the community created by the proposed development of the developer's property. *Id.* at 380.

This Court again reiterated the rule in *Krughoff v. City of Naperville*, 68 Ill. 2d 352 (1977) wherein the Court allowed the extraction of land from a developer as part of the real estate development approval process because the Court found, in that case, that the fees *were* "uniquely

attributable and fairly proportionate" to the developer's impact on the community. *Id.* at 358-359.

Similarly in the *Northern Illinois Home Builders Assn.* case, which gives rise to this claim for a refund, this Court again reiterated the "specifically and uniquely attributable" test set forth in *Pioneer* and *Krughoff. Id.* at 35.

As in the *Boynton* case, this Court, in the *Northern Illinois Home Builders Assn.* case, ruled on a specific statutory enactment and whether that statutory provision is constitutional. In the *Northern Illinois Home Builders Assn.* case the statute involved is the very statute under which the subject impact fees were collected and from which the Plaintiff CLASS seeks a refund therefrom. This Court held that the subject Highway Code revenue statute and the DuPage County impact fee ordinances were a violation of the citizens' constitutional right of due process and ordered the funds to be refunded. The law is therefore clear that the legal principle established by this Court is that the imposition of an unconstitutional tax, be it labeled a tax or a fee, is a violation of the citizens' Fifth Amendment and Art. 1, §2 constitutional right of due process and as such the fees and taxes collected thereunder must be refunded. It is fundamental that our government cannot unlawfully tax its citizens and keep the funds it unconstitutionally collected no matter how earnest or public minded its intentions. The Second District Court's decision, which reversed the trial court's order to refund the funds this Court ruled were unconstitutionally collected, perfects an unconstitutional taking of the CLASS' funds and as such must be reversed.

It is respectfully submitted that the real issue raised by this case is not whether the collection, and retention, of the taxpayers' money, paid to the County of DuPage under the subject unconstitutional enactments, is a violation of the citizens' due process constitutional rights but whether the citizens can be deprived of their right to a refund under the circumstances of this case because of the passage of time. That is the issue which this case presents and involves the very foundation of the due process clause.

As was pointed out in the Plaintiff-CLASS' Petition for Leave to Appeal and the Interveners' Petition for Leave to Appeal, if the right to a refund is limited only to those who file for a refund within the five (5) year period imposed by the Second District Court's opinion, from which this appeal is taken, without taking into consideration the significance of the Supreme Court's decision which changed the law and declared the statute to be unconstitutional, this would be to ignore the very basis of our constitutional right to due process. It would allow government to enact unconstitutional revenue statutes and ordinances with a reasonable degree of certainty that, if said enactments are later determined to be unconstitutional, the taxing body would only have to return a limited amount of the funds unlawfully collected. This would limit recovery to those who file within the Second District Court's limited time period and who have the financial resources to file and pursue an action for a refund through the judicial process to the Illinois Supreme Court, rather than to rectify the unconstitutional imposition.

The interveners, very capably, have pointed out the history of governmental efforts to extract fees from developers and individuals who improve their property and the constitutional attempts to curb the efforts of local governmental bodies to extract considerations from them by imposing ordinances to raise general revenue for purposes that are unrelated to the development against which they are assessed. In this case the impact fee ordinances applied not only to developers but to all citizens who improved their real estate.

As the Interveners stated in their Petition for Leave to Appeal, the real and practical affect of the Second District Court's decision is also to encourage local governmental units to pass questionable revenue ordinances since the developers affected thereby would be reluctant to sue the governmental unit during the development period of its project and would effectively do away with a challenge to the unlawful ordinances by those developers affected by it. It would also be economically unfeasible for an individual, or group of individuals, to finance the litigation necessary to question the constitutionality of a revenue statute or fee ordinances through the appellate process.

Further, it has been well established in the law that where a statute is declared to be unconstitutional, the rights deprived, or effected thereby, should be restored. Perhaps this is more easily recognizable in criminal cases, but the constitutional concept is the same. In *People v. McCabe*, 49 Ill. 2d 338 (1971), this Court declared certain provisions of the Criminal Code, which dealt with the sale and possession of marijuana, to be unconstitutional. After the *McCabe* decision, the Illinois Supreme Court

heard the case of *People v. Meyerowitz and Weintraub*, 61 Ill. 2d 200 (1975) which dealt with the vacation of convictions which were based upon the Criminal Code provisions struck down by *McCabe*. The defendants therein sought a refund of the fines and costs paid under their convictions. The Attorney General of Illinois opposed the retroactive application of the *McCabe* decision and the refund of fines and costs and alleged that the monies collected had been "mingled" . . . "with the general corporate revenues that are expended in the course of official business and that requiring a refund of those fines would impose an undue burden on the counties." *Id.* at 205. The Illinois Supreme Court rejected outright the Attorney General's arguments and held that, not only should the convictions and sentences be vacated, but that the defendants should receive back the fines and costs which they had paid. *Id.* at 213-214. The Court recognized the reasoning of the United States Supreme Court in the *Marchetti v. U.S.* (1968) 390 U.S. 39 and *Grosso v. U.S.* (1968) 390 U.S. 62 cases which cases are discussed hereinafter concerning the misapplication of the statute of limitations. This Court found that a citizen who is affected by an unconstitutional enactment must be restored to the position he was in before the unconstitutional statutory provisions were imposed on him.

A similar application of these same constitutional principles has been recently seen in the well publicized case of *People v. Cervantes*, 189 Ill. 2d 80 (1999) in which this Court declared the Safe Neighborhood Act to be unconstitutional. As a result of the *Cervantes* decision several convictions, which were based on offenses created or enhanced under the unconstitutional conglomeration

of bills improperly joined together, were vacated and the individuals convicted thereunder were set free.

The principle of law in the above criminal cases is no different from the situation before this Court. A constitutional right is a constitutional right. Where a statute is unconstitutional, as this Court said in *Mills v. Peoples Gas, Light and Coke Co.*, 327 Ill. 508, 535 (1927), as cited in the *Northern Illinois Home Builders Assn.* case, the consequences thereof should be nullified. As the Court stated at P35, in citing the *Mills* case. See P35: " . . . an unconstitutional act confers no rights, affords no protection, imposes no duty and is, in legal contemplation, as inoperative as though it had never passed."

Here the County of DuPage wants to keep from its citizens in excess of six million dollars it collected under certain unconstitutional ordinances which this Court has determined are "as inoperative as though they had never been passed." *Id.* This is simply wrong.

If the Second District Court's opinion herein were to be followed, it would require the filing of multiple and duplicitous lawsuits to contest the constitutionality of a revenue or other statutory enactment. This would congest the Courts' dockets for no reasonable reason and would ignore the constitutional principle that void legislation should not be enforced. The constitutional considerations are obvious. The statute and ordinances are void. The money collected thereunder should be refunded.

Conclusion

It is therefore respectfully submitted that the United States and Illinois Constitutions require that the funds collected by the County of DuPage under these invalid ordinances be refunded to the people who were required to pay them. Equity does not recognize a statute of limitations when it comes to the refund of fees and taxes which have been collected under an unconstitutional statute or ordinance. *Ross v. City of Geneva,* 43 Ill. App. 3d 976 (2d Dist. 1976) aff. *Ross v. City of Geneva,* 71 Ill. 2d 27 (1978) and *Board of Trustees v. Glen Ellyn,* 337 Ill. App. 183 (2d Dist. 1949) and the other cases discussed hereinafter in this brief. If there is any limitation on an action for a refund it is governed by the doctrine of laches and not by any statutory limitations period. *Ross v. City of Geneva,* 71 Ill. 2d 27 (1978) Also, as will be discussed hereinafter, the right to a refund does not begin to run from the date the unlawful fee or tax was paid but begins to run from the date the Supreme Court determines the constitutionality of the specific statute or ordinances involved. In this case that occurred on March 23, 1995 and the class action herein was timely filed on February 8, 1996. (R. C1) It is therefore respectfully submitted that the Second District Court's decision, from which the appeal is taken, must be reversed on constitutional grounds.

II. THE SECOND DISTRICT COURT'S DECISION TO BAR THE PLAINTIFF CLASS FROM RECOVERING A REFUND IS CONTRARY TO, AND NULLIFIES, THIS COURT'S RULING IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* DECISION WHICH DECLARED THE SUBJECT HIGHWAY CODE PROVISION AND THE RELATED DU PAGE COUNTY ORDINANCES TO BE UNCONSTITUTIONAL AND WHICH ORDERED THE COUNTY OF DU PAGE TO REFUND THE IMPACT FEES COLLECTED THEREUNDER.

Standard of Review

This point involves an issue of law concerning the interpretation of this Court's ruling in the *Northern Illinois Home Builders Assn.* case. There are no questions of fact. Therefore, the standard of review is a *de novo* review. *Illinois Life & Health Ins. Guaranty Assn. v. Boozell,* 289 Ill. App. 3d 621 (1997) and *Magna Trust Co. v. Ill. Central Railroad Co.,* 2000 Ill. App. Lexis 270 (5th Dist. 2000)

ARGUMENT

The *Northern Illinois Home Builders Assn.* case was brought by nine home builders for their own benefit to challenge the constitutionality of the subject impact fee statute and the DuPage County ordinances enacted thereunder, pursuant to which impact fees were collected between November 22, 1988 and July 25, 1990. The suit also challenged later amendments to the Highway Code which were enacted after the subject Highway Code provision was passed and pursuant to which other, DuPage County impact fee ordinances were enacted. The trial and

Appellate Courts upheld all of Highway Code provisions and DuPage County ordinances challenged by the nine builders and found that they all met the constitutional requirements. The Appellate Court decision upholding the constitutionality of said enactments was rendered on October 6, 1993.

The Illinois Supreme Court took the case and ruled, decision, that the Highway Code provision under which the 1988 and 1989 DuPage County ordinances were passed and which governed the collection of fees from November 22, 1988 through July 25, 1990 was unconstitutional. *Northern Illinois Home Builders Assn.* 165 Ill.2d 25. The Supreme Court also found that the later Highway Code provisions, under which the 1990 and subsequent DuPage County ordinances were enacted were constitutional. *Id.* at 34. In rendering its decision the Illinois Supreme Court was unequivocal in its pronouncement that the monies collected under the earlier unconstitutional statute and ordinance enactments should be refunded. This Court twice in its decision said that the "monies collected thereunder should be returned" and did not limit its ruling to the Plaintiffs in the case. The pertinent portion of the ruling states as follows: Ps 35 & 39.

> "In sum, we hold that the first enabling act is constitutionally flawed because of its failure to meet the 'specifically and uniquely attributable' test set forth in *Pioneer Trust*. Consequently, the DuPage County ordinances passed pursuant to the first enabling act are invalid **and the monies collected thereunder should be returned.** (See *Mills v. Peoples Gas Light & Coke Co.* (1927) 327 Ill. 508, 535, 158 N.E. 814 (an unconstitutional

> act confers no rights, afford no protection, imposes no duties, and is, in legal contemplation, as inoperative as though it had never been passed).) (Emphasis Added). *Id.* at 35.
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> In conclusion, we hold that: (1) the first enabling act is unconstitutional; (2) the DuPage County ordinances passed pursuant to the first enabling act are invalid and **the monies collected thereunder should be returned**;" (Emphasis Added) *Id.* at 39.

Contrary to the clear language of this Court in its above decision, the Second District Appellate Court, by its ruling from which this appeal is being taken, rewrote this Court's finding to be as follows:

> Not all of the monies collected under the unconstitutional statute and related ordinances should be returned. Rather, only monies collected from the nine named home builders should be returned, or from those who paid fees after March 23, 1990 and before July 25, 1990 and who file an action for a refund between the date of this decision (March 23, 1995) and before July 25, 1995 are entitled to the protection of their constitutional rights. Government can keep the overwhelming balance of the unconstitutionally collected monies.

If this Court had meant its finding to be as set forth by the Second District Court's holding, it is respectfully submitted, it would have said so.

In addition, the Second District Court's opinion makes an absolute nullity of the Illinois Supreme Court's language in the *Mills* case and quoted by this Court in the

Northern Illinois Home Builders Assn. decision, which is that: " . . . an unconstitutional act confers no rights, affords no protection, imposes no duty and is, in legal contemplation, as inoperative as though it had never passed." The Second District Court's opinion allows the government a multi million dollar windfall by retaining the funds it collected from its unconstitutional ordinances, this can hardly be considered as being an ordinance "that is as inoperative as though it had never been passed."

The Second District Court rewrote this Court's decision at Page 22 of their Rule 23 opinion wherein the Second District Court stated:

> The Supreme Court's order that the County return the road impact fees applies only to the nine builders that were parties to the NIHBA (Northern Illinois Home Builders Assn.) suit. (Separate Appendix P. A22)

This ruling is diametrically opposed to the language of this Court in its decision at Ps 35 and 39, where this Court made it clear that "the monies collected thereunder should be returned". The above language contained in the opinion of this Court in the *Northern Illinois Home Builders Assn.* case would seem to put an obligation on the executive branch of government to identify, and locate, the citizens who were unconstitutionally taxed in order to return the unconstitutionally taken money to them. The Second District Appellate Court's language, and opinion, rewards the executive branch of government for its unconstitutional acts and makes no sense.

It should be noted that at the time the Supreme Court rendered its decision on March 23, 1995, almost all of the impact fees that were collected under the unconstitutional ordinances had been paid more than five (5) years prior thereto. The fees had been paid from November 22, 1988 through July 25, 1990. If the Second District Court is correct in its ruling, then the only people who would still have been able to file a suit for a refund, after the Illinois Supreme Court found the subject statutory provision and ordinances to be unconstitutional, would have been those who paid the fees between March 23, 1990 and July 25, 1990, since only they would still have been within the five year period from the date of their payment. If the five (5) year statute of limitations, relied upon by the Second District Court, was applicable to the taxpayers right to a refund, the Supreme Court would have recognized that fact and would not have used the language it used in its decision. Simply stated, the Second District's ruling defeats the refund which this Court has so clearly ordered and nullifies this Court's decision.

Conclusion

The Second District Court's decision disregards, and effectively nullifies, this Court's holding in the *Northern Illinois Home Builders Association* case. It deprives the citizens of their right to the refund as ordered by this Court and as dictated by the Federal and State Constitutions. It is therefore respectfully submitted that the decision of the Second District should be reversed, on this basis as well, and that the holding of the trial court be affirmed.

III. THE SECOND DISTRICT COURT WAS IN ERROR IN ITS APPLICATION OF THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF LACHES TO THIS CASE.

A. THE SECOND DISTRICT COURT WAS IN ERROR IN APPLYING THE FIVE (5) YEAR STATUTE OF LIMITATIONS UNDER § 13-205 OF THE CODE OF CIVIL PROCEDURE (735 ILCS 5/13-205) TO THE EQUITABLE CAUSES OF ACTION PLED BY THE PLAINTIFF CLASS HEREIN FOR A REFUND OF IMPACT FEES COLLECTED UNDER AN UNCONSTITUTIONAL REVENUE STATUTE AND ORDINANCES.

Standard of Review

This issue involved the application of the statute of limitations, set forth in the Code of Civil Procedure, to equitable causes of action and is the determination of an issue of law. There are no disputed facts. Therefore the standard of review is a *de novo* review. *Ill. Life & Health Ins. Guaranty Assn. v. Boozell,* 289 Ill. App. 3d 621 (1997) *First Baptist Church of Lombard v. Illinois Toll Highway Authority,* 301 Ill. App. 3d 533 (2nd Dist. 1998).

Argument

The class action filed herein is based on the equitable causes of action of **Mandamus**, to require the County to refund funds wrongfully collected (Count I); **Declaratory Judgment**, to declare that the taxpayers are entitled to a refund (Count II); and an action for **Restitution, Assumpsit and Unjust Enrichment**, to restore the parties

to the position they were in before the invalid ordinances were enforced (Count III).

Actions in equity are not governed by the statute of limitations provisions of the Code of Civil Procedure, including § 13-205 (735 ILCS § 13/205). See *Meyers v. Kissner*, 149 Ill. 2d 1 (1992). The actions of Mandamus; Declaratory Judgment; Restitution; Assumpsit and Unjust Enrichment, plead by the Plaintiff-CLASS-are governed by equitable principals, as is set forth in *Thomas v. Village of Westchester*, 132 Ill. App. 3d 190 (1st Dist. 1985) (a Mandamus Action); *Skipka v. Inserra*, 211 Ill. App. 3d 735 (1st Dist. 1991) and *Ross v. Geneva*, 43 Ill.App. 3d 976 affd. 71 Ill. 2d 27 (1978)(Declaratory Judgment cases); *Cangas v. Marcus Auto Lease Corporation*, 176 Ill. App. 3d 127 (1st Dist. 1988) (a Restitution and Unjust Enrichment case) and *Board of Highway Commissioners v. City of Bloomington*, 253 Ill. 164 (1911) (an Assumpsit case).

Not only are the causes of action plead by the Plaintiff CLASS principally equitable in nature, but, in addition thereto, the principal [sic] cases, which have dealt with this issue, recognize that equity dictates that funds collected under unconstitutional governmental enactments should be refunded without regard to a statute of limitations period. The two principal [sic] cases which support this position and are squarely on point, are *Ross v. The City of Geneva*, 43 Ill. App. 3d 976 (2nd Dist. 1976) aff. 71 Ill. 2d 27 (Ill. Sup.1978) and *Board of Trustees v. Village of Glen Ellyn*, 337 Ill. App. 183 (2nd Dist. 1949). In both cases, the Second District held that equity requires that funds collected, or diverted, under unconstitutional

statutes or ordinances should be refunded to the taxpayers who paid them or should be applied to the purpose for which they were intended, without regard to any statute of limitations period provided for in the Code of Civil Procedure.

In the *Ross* case, the City of Geneva had passed an unconstitutional ordinance which imposed a parking surcharge upon the electric bills of the commercial accounts of the City. The trial and appellate courts found that the ordinance was unconstitutional and ordered that the funds collected, during the 13 year period in which the ordinance was in existence, be refunded. The City of Geneva attempted to interpose the defense of the five (5) year statute of limitations to limit the refund; however, the Court rejected the City's argument and stated,: [sic]

> "This complaint was filed seeking equitable relief – the imposition of a constructive trust on, and the restitution of, funds collected without statutory authority over a period of 13 years. Equity requires the return of money rightfully belonging to another [cite omitted], and this court will not sanction the nullification of equitable doctrines by close conceptual reasoning. [cites omitted] To do equity in this case requires the restitution of all parking surcharge monies collected over the 13 years under the subject ordinance."

Ross, 43 Ill. App. 3d at 976

The case was taken to the Illinois Supreme Court which affirmed the decision and addressed the issue of laches, by stating at 71 Ill. 2d 27, 34 (1978):

> " . . . there is no showing that Defendant is prejudiced by the fact that the ordinance was not attacked until 13 years after its enactment. We hold that *laches* does not ban Plaintiffs' action."

The COUNTY, in its appeal to the Second District, and the Second District Court's decision on P17, attempts to distinguish the *Ross* case on the basis that the parking fees were hidden from the taxpayers on their electric bills and that the Appellate and Supreme Courts found that fact to be significant in refusing to apply a statute of limitations period. (Separate Appendix P A17). That position is unfounded by the language of both the *Ross* Appellate and Supreme Court decisions which pay little, and almost no, attention to that fact. No where in the *Ross* decisions is there language to support the Second District Court's statement that the statute of limitations was ignored simply because of the City of Geneva's concealment of the fee. To the contrary, the *Ross* Courts were in agreement with this Court's ruling in the *Northern Illinois Home Builders Assn.* case that money collected under an unconstitutional statute must be returned without regard to any statute of limitation's period because equity so requires.

In the *Ross* case 13 years had passed from payment to the fees to the filing of the subject action to recover a refund; nonetheless, the government was still required to refund all of the monies collected under the invalid ordinance. 71 Ill. App. 3d at 985.

The second case, which is also directly on point, is *Board of Trustees v. Village of Glen Ellyn*, 337 Ill. App. 183 (2nd Dist. 1949). In that case an Illinois statute provided

that municipalities with inhabitants of more than 5,000 people were required to create a police pension board and a pension fund. The statute also required that a percentage of the fines and license fees collected by the municipality were to be paid into said pension fund. The Village of Glen Ellyn attained a population of more than 5,000 inhabitants in 1930, but did not create a pension board, or allocate funds to it, until 1945. The Village Pension Board filed an action, similar to the action filed by the Plaintiff CLASS herein, and sought an order requiring the Village to pay into the pension fund all of the fines and license fees previously collected which belonged to the fund. The Village attempted to invoke the statute of limitations to defeat the Plaintiff Class' claim and to limit the amount to be refunded; however, the Second District rejected the Village's position and stated, at Pg. 195:

> "(4) It is an elemental principle of law, applied in both law and equity courts, that where one person has received money or its equivalent, which belongs to another, under such circumstances that in equity and good conscience he ought not to retain it, recovery will be allowed. *Board of Highway Com'rs v. City of Bloomington*, 253 Ill. 164, 97 N.E. 280, Ann. Cas. 1913A, 471; *Rothschild v. Village of Calumet Park*, 350 Ill. 300, 183 N.E. 337, *Harrold v. City of East St. Louis*, 197 Ill. App. 121; *Indiana Harbor Belt Rod. Co. v. Calumet City*, 391 Ill. 280, 63 N.E. 2d 369.
>
> "In equity, the theory of recovery is predicated on the imposition of a constructive trust, *Rothschild v. Village of Calumet Park*, supra; *Kochorimbus v. Maggos*, 323 Ill. 510, 154 N.E. 235, and at law, on the basis of a quasi-contract, or

> contract implied in law. *Board of Highway Com'rs. v. City of Bloomington*, supra; *People v. County of Alexander*, 310 Ill. App. 602, 35 N.E. 2d 92."

The Court ordered that the Village pay into the pension fund all of the monies collected during the 16 year period during which the funds were collected which should have been paid into the fund without regard to any statute of limitations restrictions. The Court stated at P.198:

> "[11] Nor can the statute of limitations be invoked to defeat plaintiffs' right to assert the cause of action, since defendant's wrongful act prevented the creation of a proper legal entity to protect and supervise the pension fund until 1946. This court will not sanction the nullification of equitable doctrines by close conceptual reasoning, and it is our opinion that the plaintiff board is a proper party to bring this suit. Therefore, the circuit court committed no error in entering judgment for the percentage of the revenues designated by the statute which defendant failed to allocate to the fund and diverted to its own use from 1931 to 1945."

The COUNTY, in its brief to the Appellate Court, and the Second District Appellate Court in its decision on P17 and P18, attempt to distinguish away the Court's equitable pronouncements on the argument that the holding in the *Village of Glen Ellyn* case was based on the fact that no board had been created which could have brought the action during the statute of limitations period and that it was for that reason the Second District Court ordered a refund beyond the statute of limitations period. (Separate Appendix pgs A17-18). The Second District Court which

heard the *Village of Glen Ellyn* case did not decide the case on the concealment issue but decided the case on equitable principles. The Court found that it would be inequitable for a municipality to retain funds that belonged to the pension fund, which funds had been wrongfully applied and were being wrongfully withheld. *Id.* at 480.

The *Ross* and *Village of Glen Ellyn* cases are directly on point and the Second District Court's attempt to distinguish them ignores the equitable pronouncements of those cases. Both cases hold that, in situations where a governmental entity wrongfully collects funds under an unconstitutional statute, or wrongfully applies funds collected from the public, the parties who paid said funds are entitled to a refund, and the citizens who paid said fees that were wrongfully diverted are entitled to the proper application of all of said funds, irrespective of any statute of limitations period because equity so requires.

The only case cited by the COUNTY in its brief to the Second District and relied upon by the Second District in the decision from which this appeal is taken is *Rath v. City of Chicago*, 207 Ill. App. 117 (1st Dist., 1917). It is difficult to understand why the Second District Court rejected the well reasoned decisions of *Ross v. City of Geneva*, 43 Ill. App. 3d 976 (2d Dist 1976) aff. 71 Ill. 2d 27(1978) and *Board of Trustees v. Village of Glen Ellyn*, 337 Ill. App. 183 (2nd Dist. 1949) from its own district and embraced the extremely old, extremely brief and not well reasoned decision in the *Rath* case from the First District but; nonetheless, that's what it did.

In distinguishing the *Rath* decision, it should first be noted that this Court has held in that Appellate Court

decisions issued prior to 1935 have no binding authority. *Bryson v. News America Publications, Inc.* 174 Ill. 2d 77, 95 (1996). In addition to the age of the *Rath* decision, it should also be noted that the *Rath* case did not deal with any of the arguments raised by the Plaintiff CLASS herein or considered by the Second District in the *Ross* and *Village of Glen Ellyn* cases, including the equitable arguments and equitable causes of action plead herein. Also, the discussion of the statute of limitations issue was addressed in one brief paragraph in the *Rath,* 207 Ill. App. at 121 which can hardly be considered as an informative discussion of the issue.

In the *Rath* case, the Plaintiff filed a claim for the refund of a gun license fee which he had paid under a municipal ordinance, which ordinance was later determined to be unconstitutional. The Plaintiff's claim for a refund was based on the theory that the gun application was a written contract and as such was controlled by the the [sic] ten (10) year statute of limitations applicable to written agreements rather than the five (5) year statute of limitations offered by the City. *Id.* at 118. The Plaintiff never argued that his right to a refund was based upon equitable principals [sic] and never raised any of the equitable causes of action brought by the Plaintiff CLASS herein or as discussed in the *Ross* or *Village of Glen Ellyn* cases. The First District Court, in a one paragraph dissertation, dealt with the statute of limitations issue and rejected the written contract theory which the plaintiff used to explain away his delay in bringing the subject action for a refund. The Plaintiff also failed to raise the argument that the cause of action for a refund commenced to run from the date the ordinance was declared

to be unconstitutional rather than from the date the license fee was paid. The First District Court merely adopted the five (5) year statute of limitations applicable to oral contracts, as suggested by the City, to defeat the Plaintiff's claim and found that the statute began to run from the date of payment of the fees. The Plaintiff in the *Rath* case, failed to recognize or offer the constitutional and equitable causes of action discussed herein and failed to argue that if a period of limitations were applicable, it began to run from the date the statute was declared unconstitutional and not the date of the payment of the fee. The plaintiff merely relied upon a ten (10) year statute of limitations verses a five (5) year statute of limitations argument. The *Rath* case is an old, extremely brief and not well reasoned opinion that should not be a basis for denying the Plaintiff CLASS' claim herein. The Second District Court's reliance on the *Rath* case is not well founded.

The Second District Court also attempts to justify its decision on its recent opinion in the *Raintree Homes v. Village of Kildeer* case, 302 Ill. App. 3d 304 (2nd Dist. 1999). In that case the issue was whether an action for a refund of fees paid to a governmental entity was governed by the one year statute of limitations under the local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8 – 101) or the five (5) year statute of limitations period under Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205). The Second District Court's decision in the *Village of Kildeer* case makes no reference to the arguments, and issues, raised by the Plaintiff CLASS herein. It appears that the issues set forth herein were never before, nor considered by, the Court. In

that case all the Court held was that an action for a refund of fees is not a tort and is therefore not governed by the one (1) year statute of limitations set forth in the Tort Immunity Act. *Id.* at 307 The Court was never confronted with the equitable arguments raised by the Plaintiff Class herein and discussed in the *Ross* and *Village of Glen Ellyn* cases nor did it consider the issue of whether a statutory limitations period, if applicable, begins to run from the date of the payment of a fee or from the date of the decision which rules upon the unconstitutionality of the statute or ordinances which creates the fee. Since the *Village of Kildeer* case does not address the equitable arguments, nor involve the constitutional and factual issues raised by the case before this Court, it is respectfully submitted that the Second District Court's reliance on this case is also not well founded.

Conclusion

In summary on this point, it is respectfully submitted that the Second District Court is in error in disregarding the *Ross* and *Board of Trustees* decisions and in applying the five (5) year statute of limitations period of § 13-205 of the Code of Civil Procedure to the equitable causes of action plead by the Plaintiff CLASS herein. The Court's reliance on the 1917 First District opinion in the *Rath* case and its decision in the *Raintree* case, which dealt with an entirely different issue, demonstrates the error in the Court's reasoning on this point. The Plaintiff CLASS respectfully submits that the Second District Court's decision to apply the statutory limitations period to this case is in error and that said decision should be reversed on this point as well.

B. THE SECOND DISTRICT COURT WAS NOT ONLY IN ERROR IN APPLYING A STATUTE OF LIMITATIONS PERIOD TO THIS CASE BUT WAS ADDITIONALLY IN ERROR IN ITS DETERMINATION THAT THE CAUSE OF ACTION FOR A REFUND BEGAN TO RUN FROM THE DATE THE IMPACT FEES WERE PAID RATHER THAN FROM THE DATE THE ILLINOIS SUPREME COURT RENDERED ITS DECISION IN THE *NORTHERN ILLINOIS HOME BUILDERS ASSN.* CASE WHICH DECLARED THE HIGHWAY CODE PROVISIONS AND THE DUPAGE COUNTY ORDINANCES TO BE UNCONSTITUTIONAL AND CREATED THE RIGHT TO A REFUND.

Standard of Review

This issue also involved the application of the statute of limitations, set forth in the Code of Civil Procedure to equitable causes of action and is the determination of an issue of law. There are no disputed facts. Therefore the standard of review is a *de novo* review.

This issue also involves the statute of limitations set forth in the Code of Civil Procedure; however, it pertains to the event which gives rise to the commencement of said statutory limitations period, if it is applicable at all to this situation. That is a question of law and involves no factual disputes. Therefore, the standard of review is a *de novo* review. *Ill. Life & Health Ins. Guaranty Assn. v. Boozell,* 289 Ill. App. 3d 621 (1997) *First Baptist Church of Lombard v. Illinois Toll Highway Authority,* 301 Ill. App. 3d 533 (2nd Dist. 1998).

Argument

As set forth hereinabove, the Plaintiff CLASS' position is that the statute of limitations provisions of § 13-205 are not applicable to equitable causes of action and should not be considered as affecting their right to a refund. However, even if the five (5) year statute of limitations period were applicable, the time for commencing that period did not begin to run until this Court made its ruling on March 23, 1995 in the *Northern Illinois Home Builders Assn.* case which declared the subject Highway Code provision and DuPage County ordinances to be unconstitutional. This Court's decision created the right to a refund.

There is no dispute that a cause of action can be created by a case decision. See *People ex rel. Foreman v. Village of Round Lake Park*, 171 Ill. App. 3d 443, 456 (2nd Dist. 1988). Even the Second District Court recognizes this rule in the decision from which this appeal is taken at P18. (Separate Appendix pg A18) However, after acknowledging the rule, the Second District ignores the rule when it declared that the right of the Plaintiff CLASS for a refund herein began to run from the date the class members paid their respective impact fees rather than from the date the Illinois Supreme Court held the very Highway Code provision and DuPage County ordinances which are the subject of this action for a refund to be unconstitutional. Respectfully, the Second District Court of Appeals is just wrong on this point.

It is especially difficult to understand the Second District Court's reasoning on this point in light of the facts of this case which are that prior to the Supreme

Court's decision, which declared the subject Highway Code provision and DuPage County ordinances to be unconstitutional, the DuPage County trial court and the Second District Appellate Court had both ruled that the same Highway Code provision and DuPage County ordinances *were* constitutional and that the parties who paid the impact fees *were not* entitled to a refund. *Northern Illinois Home Builders Assn. v. County of DuPage*, 251 Ill. App. 3d 494 (2nd Dist. 1993). After that decision was rendered, and during the remainder of the five (5) year statute of limitations period imposed by the Second District Court herein, the Plaintiff CLASS virtually had no right to pursue or obtain a refund since the issue had been resolved against them. Had the individuals who paid the impact fees filed the entitled action for a refund after the Appellate Court rendered its decision, their case would have been dismissed because of the recent Second District Appellate Court's decision which determined that the subject Highway Code provision and DuPage County ordinances *were* constitutional. The Plaintiff CLASS members would have been subject to attorneys' fees and costs, under Supreme Court Rule 137, for filing an action on the same set of facts, and challenging the same statute and ordinances, which had just been recently ruled upon by the Second District and which were found to be valid. The fact that there was an Appellate Court decision directly against the Plaintiff CLASS' position makes the situation even more compelling not to apply a statutory limitation period, as the Second District Court did in this case. Clearly the Plaintiff CLASS' right to bring this suit did not arise until the Illinois Supreme Court reversed the Second District Court's decision and

declared the subject statute and ordinances to be unconstitutional.

A case that dealt with the rule of law that a cause of action can be created by a case decision, is *People ex rel. Foreman v. Village of Round Lake Park,* 171 Ill. App. 3d 443 (Ill. App. 2nd Dist. 1988). In that case, the plaintiffs attempted to rely upon a recently decided 1981 Supreme Court decision which had restated a principal [sic] of law created in a 1977 Illinois Supreme Court decision to justify their failure to file their claim within the one-year statute of limitations period applicable to contest annexation proceedings. The Second District held that a legal right could be created by a case decision and found that the case which created the change in the law was the 1977 case and not the 1981 case cited by the Plaintiffs. The court stated at P456:

> "This argument must be rejected. *Village of Barrington Hills* was decided by the Illinois Supreme Court in June 1980. At that point, one Illinois municipality's right to challenge another's zoning was defined. The right did not depend on denial of *certiorari* by the United States Supreme Court. Furthermore, the *Village of Barrington Hills* court indicated that it was not creating a new right of action, but rather was restating a rule already articulated in *City of Hickory Hills v. Village of Bridgeview* (1977), 67 Ill. 2d 399, 10 Ill. Dec. 539, 367 N.E. 2d 1305. Plaintiffs here should have 'discovered' their right of action in 1977, not January, 1981."

The *Foreman* decision recognized that a case decision which changes the law or makes a new legal pronouncement creates a cause of action and is the starting date for

computing a statute of limitations period, if one is applicable. The *Foreman* decision is also consistent with the cases from other jurisdictions, which are cited hereafter and rely upon the same legal principal [sic], but are more similar to the facts before this Court.

Before referring to said cases it should be noted that, in the case before this Court, the decision which created the cause of action for the refund of the impact fees which the Plaintiff CLASS is seeking is clearly the holding in the *Northern Illinois Home Builders Assn.* case which ruled on the constitutionality of the very Highway Code provision and the subject DuPage County ordinances which are the subject of this cause of action for a refund and not the *Pioneer Trust & Savings Bank v. Village of Mt. Prospect,* 2 Ill. 2d 375 (1961) or the *Krughoff v. City of Naperville,* 68 Ill. 2d 352 (1977) cases cited by the Second District Court in its decision. (Separate Appendix pg A18). Those cases merely set forth the general principles applicable to the due process considerations under which the subject statutes were weighed against, but make no findings, or pronouncements, as to whether the subject Highway Code provision and DuPage County ordinances violate said constitutional standards.

In the *Pioneer Trust* and *Krughoff* cases the Court found that charges assessed against citizens by way of a fee must be "specifically and uniquely attributable" to the added governmental expenses created by said citizens' activity and if not, the fee fails to meet the due process requirements. The *Pioneer* and *Krughoff* cases merely set forth the constitutional requirements necessary for a fee statute to be constitutional but did not rule on the applicability of those standards to the specific statute and

ordinances under which the subject impact fees were paid. The constitutionality of the statute and ordinances involved in this case was determined by this Court in the *Northern Illinois Home Builders Assn.* decision which interpreted the very statutory provision and DuPage County ordinances in question. Simply stated, the right to a refund was created by the Illinois Supreme Court's ruling in the *Northern Illinois Home Builders Assn.* case on March 23, 1995 and not by the *Pioneer* or *Krughoff* cases, which only discuss the general principle of law applicable to the constitutional right of due process and not to the enforceability of these specific enactments.

There are several other decisions from other jurisdictions which support the Plaintiff CLASS' position and are inopposite [sic] to the Second District Court's ruling herein. They include the cases discussed hereafter.

One of such cases is *Owens v. Floyd County*, 94 Ga. App. 532, 95 S.E. 2d 389 (Ga.App. 1956) which is factually similar to the case before this Court. In that case the Georgia General Assembly enacted a statute which changed the officers of Floyd County from a fee system to a salary system. The statute was declared unconstitutional by the Georgia Supreme Court. Thereafter, the Plaintiff brought suit against the County and sought a taxpayers' refund for the difference between the fees paid and the salaries received during the period in which the statute was in effect. The County moved to dismiss the case on the grounds that the case was brought four (4) years after the payments were made, which was beyond the three (3) year statute of limitations. The Georgia Appellate Court ruled that the right of action to seek the return of funds unlawfully collected by the County did

not accrue until the Supreme Court found the statute in question to be unconstitutional and stated at P392:

> "[t]he right of action in the instant case did not accrue until the Supreme Court decided, on October 11, 1955. Walden v. Owens, 211 Ga. 884, 89 S.E.2d 492, that the Act changing certain officers of Floyd County from the fee system to the salary system was unconstitutional."

Another of said cases is *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972). In that case the defendant's automobile was forfeited in 1962 as a result of the defendant's involvement in a gambling business. In 1968 the United States Supreme Court, in two cases, *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889 (1968) and *Grosso v. United States Coin and Currency*, 390 U.S. 62, 88 S.Ct. 708, 19 L.Ed.2d 906 (1968), ruled that the violation of the privilege of self-incrimination, which occurred in a gambling prosecution, was a complete defense to a forfeiture proceeding based on said gambling prosecution. The Government complained that the Court's decision would involve the potential refund of "almost $7 million worth of property". *Id.* at 1355. Nonetheless, the Court ruled that the funds would have to be returned. Shortly after the *Marchetti* and *Grosso* cases were decided, and in reliance thereon the defendant moved to vacate his forfeiture. The motion was denied as being untimely under Federal Rule 60(b). The Court of Appeals held that the denial of the Motion to Vacate was "without prejudice to the rights of the appellant to file a new proceedings in accordance with its opinion." *Id.* at 1358.

The issue considered by the Court in *United States v. One 1961 Red Chevrolet Impala Sedan* is the very issue before this Court; that being, whether a right to a refund of monies which the government obtained pursuant to the violation of a citizen's constitutional right can be created by the holding in a Court decision which renders the constitutional pronouncement. The Government argued that the defendant owner's cause of action began to accrue on the date the defendant's automobile was seized and that the defendant was barred from bringing the action for a refund. The Court of Appeals disagreed with the Government's position and held that the period of limitations began to run from the date of the decision in the *Marchetti* and *Grosso* cases, which interpreted the law and created the right to a refund. The Court stated at P1358:

> "The period of limitations does not always begin on the date of the wrong. See *Cooper v. United [**11] States,* 7th Cir. 1971, 442 F.2d 908. No cause of action generally accrues until the plaintiff has a right to enforce his cause. (Cites Omitted) The right to sue is hollow indeed until the right to succeed accompanies. Patently, appellant in the instant case had no reasonable probability of successfully prosecuting his claim against the government prior to the enunciation of the new Marchetti-Grosso rule on January 29, 1968. We realize that mere ignorance of one's rights will not toll the limitations period. (Cites Omitted) This is not, however, a case in which a plaintiff is ignorant of his rights, but rather a case of a plaintiff without a right."457 F.2d at 1358.

It should be noted that the same rule of law, and the same holding, was pronounced by the Illinois Supreme Court in the cases of *People of the State of Illinois v. Meyerowitz and Weintraub*, 61 Ill. 2d 200 (1975). In that case the defendants had been prosecuted under a criminal statute concerning the sale and possession of marijuana which statute had been declared unconstitutional by the Illinois Supreme Court in *People v. McCabe*, 49 Ill. 2d 338 (1971). The defendants moved the Court to vacate their convictions and sentences and to also return their fines and costs. The Attorney General of Illinois opposed the retroactive application of the *McCabe* decision. The Supreme Court rejected the Attorney General's arguments and cited the *Marchetti* and *Grosso* cases in its decision. The Court ordered that the funds be returned. 61 Ill. 2d at 214

Another case that is also on point is *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (No. Carolina Sup.Ct. 1984). That case involved a medical malpractice suit and an action for loss of consortium. The defendant alleged that the plaintiff's complaint was filed beyond the three (3) year statute of limitations. The plaintiff argued that his right to claim a loss of consortium, for injuries occasioned to his wife by the defendant physician's negligence, did not accrue until the North Carolina Supreme Court recognized the right of loss of consortium in the case of *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (1980). The *Nicholson* decision overruled prior decisions that had taken away the right of loss of consortium. The North Carolina Supreme Court, in rejecting the defendants' arguments, stated at P585:

> "The plaintiff's cause of action for loss of consortium did not accrue until the date of the *Nicholson* opinion, 3 June 1980. Therefore, the plaintiff's suit, which was instituted on 27 February 1981, was timely filed within the three-year statute of limitations and the trial judge correctly denied defendant's motion to dismiss Mr. Wall's claim."

Another case which supports the Plaintiff-CLASS' position is *Neely v. United States*, 546 F.2d 1059, (3rd Cir. 1976). In that case the Federal Court of Appeals dealt with a class suit for the refund of fines, penalties and costs paid by individuals convicted under the Tucker Act, which Act had been declared unconstitutional by the *Marchetti* and *Grosso* cases, cited hereinabove. The government claimed that the plaintiff class members knew of their right to file an action when they paid their fines and costs and that the statute of limitations began to run from the date of payment rather than from the date of the holdings in the *Marchetti* and *Grosso* cases. The *Neely* Court rejected the government's arguments and stated at P1068:

> "The government contends that the statute of limitations commenced to run at the time of payment of the fines and that the exception for inherently unknowable claims did not suspend its running. The government's argument is that there was notice prior to *Marchetti* and *Grosso*, in lower court cases and in the Supreme Court's decision in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 15 L.Ed. 2d 165, 86 S.Ct. 194 (1965), that a wagering tax convictions [sic] could be successfully challenged on Fifth Amendment grounds. However persuasive this

> contention might be elsewhere, it simply does not wash in this court. **It requires a litigant to possess constitutional prescience that this court itself does not possess.** The *Grosso* case originated in the United States District Court for the Western District of Pennsylvania. Grosso's contention was first rejected by that court, then it was rejected by our court, *United States v. Grosso*, 358 F.2d 154 (3d Cir 1966). We relied on *United States v. Kahriger*, 345 U.S. 22, 97 L.Ed. 754, 73 S.Ct. 5120 (1953) and *Lewis v. United States*, 348 U.S. 419, 99 L.Ed. 476, 75 S.Ct. 415 (1955), authoritative precedents, at the time, which were later expressly overruled by the Supreme Court in *Marchetti*. 390 U.S. at 54. To require clairvoyance in predicting new jurisprudential furrows plowed by the Supreme Court, under these circumstances, **would be to impose an unconscionable prerequisite to asserting a timely claim** (emphasis added).
>
> Accordingly, we hold that rights accruing under *Marchetti* and *Grosso* were inherently unknowable prior to January 29, 1968, when those cases were decided. The statute of limitations on such claims was, therefore, suspended and did not begin to run until that date. *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972)."

The *Neely* case, and the other cases cited hereinabove, are completely inopposite [sic] to the Second District Court's holding herein and its ruling that the right to a refund was created by the *Pioneer* and *Krughoff* cases which pertained to the general constitutional principles rather than the *Northern Illinois Home Builders Assn.* case which ruled on the constitutionality of the subject statute

and ordinances. The *Neely* case makes it clear that to require a party to anticipate that there will be a change in the law would require a plaintiff to possess "clairvoyance" when deciding to file a cause of action, which the Appellate court in the *Neely* case stated "would be to impose an unconscionable prerequisite to asserting a timely claim." *Id.* at 1068. It is respectfully submitted that the COUNTY'S argument, and the decision of the Second District on this issue, are clearly in error.

If the five year Statute of Limitations were applicable to this case, and is to be applied as the Second District Court has ruled herein, this Court would certainly have been aware of that fact when it decided the *Northern Illinois Home Builders Assn.* case and declared that the monies collected thereunder should be returned. This Court's pronouncement to return monies collected would make no sense if the five (5) year statute of limitations were applicable. By its ruling this Court recognized that every taxpayer has a constitutional right to receive a refund of monies paid under an unconstitutional enactment and that, if a statute of limitations or laches is to apply, the period begins to run from the date of the decision which declares the statute and/or ordinance to be unconstitutional and not the date of payment, especially where an appeal is pending to this Court from an appellate decision which upheld the constitutionality of the subject statute and ordinances.

Conclusion

As set forth hereinabove, the Second District Court's application of the statute of limitations and its decision

that the statutory period began to run from the date of the payment of the impact fees rather than from the date of this Court's decision which declared the Highway Code and the DuPage County ordinances to be unconstitutional is completely without precedent; is diametrically opposed to the well reasoned decisions set forth hereinabove; is opposed to the constitutional principle of due process and is inopposite [sic] to this Court's pronouncement in the *Northern Illinois Home Builders Assn.* case. It is therefore respectfully submitted that this Court should reverse the Second District Court's decision as to the commencement of the time period utilized to compute the statute of limitations period if this Court finds that the statute of limitations applies to this case at all.

C. THE SECOND DISTRICT COURT WAS IN ERROR IN ITS APPLICATION OF THE DOCTRINE OF LACHES TO BAR THE PLAINTIFF CLASS' RIGHT TO A REFUND.

Standard of Review

This issue involves the trial court's rejection of COUNTY'S defense of the doctrine of laches. The standard of review which the Appellate Court was required to utilize in reviewing the trial court's rejection of the defense is whether the trial court abused its discretion. *Hannigan v. Hoffmeister,* 240 Ill. App. 3d 1065, 1074 (1992).

Argument

The Second District Court misapplied the doctrine of laches and considered evidence that was not in the record

but which was first seen in the COUNTY'S Appellate Reply Brief. The Second District Court premised its decision on the fact that the CLASS representative, SUNDANCE, had paid its impact fees under protest and had filed an action for a refund at or about the same time that the nine litigants in the *Northern Illinois Home Builders Assn.* case filed their action for a refund in the case which ultimately declared the subject statute and ordinances to be unconstitutional. (Separate Appendix pgs A3, A19-20, A23)

The fact that SUNDANCE had filed an action and voluntarily non-suited its case was never presented into evidence in the trial court nor was it part of the record on appeal. It found its way into this case, for the first time, in the COUNTY'S Reply Brief.(Separate Appendix Pg. A230). Pursuant to *Suarez v. Pierar*, 278 Ill.App. 3d 767, 770 (3rd Dist 1996) this evidence should not have been considered by the Second District Court and abhors the record. Nonetheless, the Second District Court not only considered this evidence but placed considerable weight thereon. This is improper and the Second District Court's decision on this point should be disregarded. The Second District Court also ignored the argument, raised by the Plaintiff CLASS in oral argument, that SUNDANCE'S voluntary non-suit of its case was based on the fact that the constitutional challenge to the subject Highway Code provision and DuPage County ordinances was being pursued by the Northern Illinois Home Builders Assn. members and that SUNDANCE'S continued pursuit of its claim would have been duplicitous litigation.

The Second District Court also paid little attention to the Plaintiff CLASS' argument that after the Second District had upheld the constitutionality of the subject statute and ordinances in 1993, SUNDANCE and the CLASS would still have been reluctant to file a suit for a refund because of the Second District's decision which upheld the constitutionality of the subject statute and ordinances. The suit would have been dismissed outright and would have subjected the CLASS to Supreme Court Rule 137 sanctions.

With reference to the Second District Court's ruling on the laches issue, the cases of *Milligan v. Board of Fire and Police Commissioners of Glenview,* 158 Ill. 2d 85 (1994) and *Summers v. Village of Durand,* 267 Ill. App. 3d 767 (2nd Dist. 1994), cited by the Second District in its opinion, are cases cited by the Plaintiff CLASS in its Appellate brief and involve the requirements which a party must follow to successfully raise the defense of laches.

To invoke the defense of laches a defendant must establish two things; first that the Plaintiff lacked due diligence in bringing the suit and second that the party asserting the defense was prejudiced thereby. In *Meyers v. Kissner,* 149 Ill. 2d 1 (1992) the Illinois Supreme court defined laches at P12:

> " . . . *laches* is such a neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity (cite omitted)"

In *Summers v. Village of Durand*, 267 Ill. App. 3d 767 (2nd Dist. 1994), the Court discussed the defense of *laches* and stated at P 770:

> "*Laches* is an equitable doctrine which bars an action where, because of an unreasonable delay in bringing suit, a party has been misled or prejudiced or has taken a course of action different from what he would otherwise have taken."

In the *Summers* case, the Court also stated that where the defense of *laches* is not apparent from the facts of the complaint, as is the case before this Court, the grounds of *laches* "must be supported by affidavit" setting forth the facts upon which the defendants rely. *Id.* at 771. The COUNTY'S only attempt to assert the defense of *laches* is an affidavit of a county engineer that the money collected under the unconstitutional ordinances was spent. (R. C988).

With reference to the requirement that the grounds for laches must be apparent from the plaintiff's complaint and that the defense of laches be supported by affidavits of the defendant, the Plaintiff CLASS respectfully submits the case of *Schons v. Monarch Ins. Co. of Ohio*, 214 Ill. App. 3d 601 (1st Dist. 1991). In the *Schons* case the plaintiff filed suit for the reformation of an insurance contract entered into some thirteen (13) years before and alleged that the contract was based on a mistake of fact. The trial court granted the defendants' motion to dismiss; however, the appellate court reversed the trial court's decision and found that the defense of *laches* was not properly plead or perfected. The Court stated at P 610:

> "The defense of *laches* was not apparent from the face of the complaint, and the motion to

> dismiss was not supported by affidavit. The motion was not verified by defendants, and the only support for these defenses appears in the factual assertions made by defendants' counsel in the memorandum filed with the motion to dismiss. Because these factual assertions were not supported by affidavit, the record contains no sworn allegations by defendants controverting the assertions made by plaintiff in her complaint. Consequently, there was no reliable evidence in the record to establish that plaintiff's claim was barred under the doctrine of *laches*, and the trial court erred in dismissing the complaint with prejudice on this basis."

The Second District Court incorrectly accepted the COUNTY'S argument that it has been prejudiced by the Plaintiff CLASS' not filing their action sooner and discharges the prejudice requirement by saying that the money has been spent on road improvements and that that is enough. (Separate Appendix pg A23).

The mere assertion that a governmental body has spent money it had no constitutional right to collect does not satisfy the laches requirement of prejudice and is not supported by any case decisions nor is it constitutionally sound. To the contrary, the cases of *Ross v. City of Geneva*, 71 Ill. 2d 27 (1978) and *DeBruan v. Elrod*, 84 Ill. 2d 128 (1981) are both cases in which fees collected under an unconstitutional statute had been spent. This Court paid little attention to the fact that the money had been spent to excuse the government from refunding the funds.

It should be noted that the COUNTY'S use of the funds occurred long before the Illinois Supreme Court rendered its decision on March 23, 1995 and long before

this Court declared the ordinances to be invalid. (C 988-989) The money had been spent without regard to the constitutional challenge that had been pending since June of 1989 when the nine Northern Illinois Home Builders Assn. members filed their suit to contest the validity of the very ordinances in question. Inasmuch as that suit did not deter the COUNTY from spending the impact fees which they collected, it would be naive to believe that the COUNTY would have refrained from making the road improvements it made because of a second identical suit filed by SUNDANCE. The Second District Court's reasoning under the laches argument is another example of the Second District Court's misconception of the law and the constitutional principles involved.

In this case the Second District Court is simply in error in not recognizing the fact that the cause of action for a refund herein was created at the time the Supreme Court declared the Highway Code provision and DuPage County ordinances to be unconstitutional on March 23, 1995. That is the controlling date to be considered. There is no basis for laches considerations if that is the controlling date. The Second District is fixated on the proposition that the cause of action for a refund could only accrue at the time the impact fees were paid. This reasoning is contrary to the cases cited hereinabove and the constitutional principles of due process. The idea of requiring a plaintiff to anticipate changes in the law when considering due diligence in the filing an action was discussed in the above cases and in the language from the *Neely* case, 546 F.2d 1059 (3rd Cir. 1976) and clarifies the error of the Second District Court in its application of the

statute of limitations and the doctrine of laches. The *Neely* Court stated at P1068:

> " . . . to require clairvoyance in predicting new jurisprudential furrows plowed by the Supreme Court, under these circumstances, would be to impose an unconscionable prerequisite to asserting a timely claim."

It should also be noted that § 1-6004 of the Counties Act (55 ILCS 5/1-6004) provides for the payment of judgments out of the general revenue of the County. The order from which this appeal stems is a judgment against the COUNTY for which the trial court correctly ruled should be paid. The funds have already been transferred from the general revenue of the COUNTY to an escrow account with the DuPage County Treasurer for payment of this judgment to those who have filed claims for a refund and for the payment of fees and costs therefrom. (R. C1276) The remainder of the unclaimed portion has been ordered to be applied to the benefit of those most closely associated with the Plaintiff CLASS members; namely, the current real estate taxpayers of DuPage County who will receive a proportionate benefit because of the application of the unclaimed funds against the next tax levy. This will result in a proportionate credit against each of their next issued real estate tax bills.

Simply stated, the Second District Court's ruling on the issue of laches totally ignores the requirements of the defense of laches by completely disregarding the fact that the cause of action accrued when the Highway Code provision and the DuPage County ordinances were declared to be unconstitutional on March 23, 1995 rather than the dates upon which the impact fees were paid and

by the Court's accepting, as a showing or prejudice, the fact that the monies collected under the unconstitutional ordinances has been spent. This suit was filed within eleven months from the date the Illinois Supreme Court found the subject statute and ordinances to be unconstitutional and created the right to a refund. That certainly is not, and has not even been argued herein, as being a lack of diligence in the bringing this action for a refund.

The Second District Court also disregards the fact that during the period from the payment of the fees to the determination of the constitutionality of the controlling statute and ordinances, an appeal was pending to this Court from an Appellate Court decision which had declared the subject statute and ordinances to be constitutional.

The Second District also ignored the standard of review applicable to the review of the trial court's determination on the issue of laches, which standard is whether the trial court's decision is against the manifest weight of the evidence. *Hannigan v. Hoffmeister*, 240 Ill. app. 3d 1065, 1074 (1st Dist. 1992). The Second District Court makes no mention of that standard of review or wherein they found the trial court's decision to be against the manifest weight of the evidence. They simply disregard the very standard they are required by law to apply. This is another example of the Second District Court's misunderstanding of this case and the issues presented.

Conclusion

It is respectfully submitted that the Second District Court's decision concerning the defense of laches is unsupported in the law and the facts of this case and is constitutionally flawed as was its decision in the *Northern Illinois Home Builders Assn.* appeal in which it upheld the subject Highway Code provision and DuPage County ordinances which this Court later found to be unconstitutional. It is therefore respectfully submitted that the Second District Court's decision concerning the defense of laches is incorrect and should be reversed.

CONCLUSION

It is respectfully submitted that the Second District Appellate Court's decision from which this appeal is taken is diametrically opposed to the constitutional safeguards against unlawful taxation; the ruling of this Court in the *Northern Illinois Home Builders Assn.* case and the rules of law set forth herein.

It is further respectfully submitted that this is a straightforward case. A statute was enacted under which certain DuPage County ordinances were passed. The enabling statute and the DuPage County ordinances were subsequently determined to be unconstitutional by this Court which pronounced that the monies collected under the invalid ordinances should be returned. The County of DuPage refused to refund the money to the people who paid the fees. The Second District Court of Appeals disregarded this Court's ruling to refund the money and inappropriately applied a statute of limitations period to defeat the citizens' right to a refund.

It is first fundamentally wrong and inopposite [sic] to the Federal and Illinois Constitutions, for the government to keep funds unlawfully taxed upon its citizens. This has been pronounced by this Court in the *Northern Illinois Home Builders Assn.* decision and numerous other decisions cited herein. This Court has so clearly pointed out that an unconstitutional act confers no rights, imposes no duties and is as in [sic] inoperative as though it had never been passed. The Second District ignores that fundamental principle by its decision herein to allow the County of DuPage to keep monies it collected under an unconstitutional statute and invalid ordinances and effectively deprives the citizens of their right to due process. As such the Second District Court's decision is violative of the Federal and Illinois Constitutions and should be reversed.

Secondly, this Court has ruled on the constitutionality of the very same statutory provision and DuPage County ordinances which are the subject of this class action for a refund. The Second District Court's ruling herein is in direct opposition to this Court's ruling in the *Northern Illinois Home Builders Assn.* decision. This Court ruled that the monies c [sic] collected under the unconstitutional statute and ordinances should be returned. The Second District Court has ignored the clear pronouncements of this Court and ordered that the County of DuPage can keep the funds this Court ordered be returned. The effect of the Second District Court's decision is to nullify the order of this Court which authority said Court does not have.

Third, the Second District Court misapplied the statute of limitations provision of the Code of Civil Procedure to the entitled action which is based on equitable claims and considerations. The Second District Court also misconstrued the time upon which the cause of action accrued as being the date the fees were paid rather than the date this Court made its determination that the subject statute and ordinances were unconstitutional. To make the holding it did, the Second District Court had to reach back to a First District 1917 case and to ignore the more recent, and better reasoned, cases from its own district which were inopposite [sic] thereto, as well as the numerous other authorities from both within, and without this, jurisdiction.

Lastly, the Second District Court misapplied the defense of laches to this case by looking to matters that were not in the record and were raised for the first time in the COUNTY'S Reply Brief; by ignoring the standard of review of manifest weight of the evidence to the trial court's finding that laches had not been shown; by finding that the mere allegation that the money unlawfully collected had been spent as being sufficient to satisfy the element of prejudice and by ignoring the fact that the cause of action for a refund arose out of this Court's determination that the statute and ordinances were unconstitutional on March 23, 1995 and was not predicated on the date of the payment of the fees.

It is respectfully submitted that for all of the above reasons, and the matters set forth herein, the Second District Court of Appeals' decision, which reversed the trial court's order to refund the monies paid under the unconstitutional DuPage County ordinances, should be

reversed and the case should be remanded to the Second District for determination of the unresolved issues raised in the COUNTY'S appeal.

Respectfully submitted,

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No. 01-22

In The

Supreme Court of the United States

SUNDANCE HOMES, INC., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

COUNTY OF DUPAGE, body corporate and politic, JOHN LOTUS NOVAK, Treasurer, GEORGE KOUBA, Finance Director, DONALD ZEILENGA, Director of Transportation, FIFIELD COMPANIES, INC., CAMBRIDGE HOMES, INC., CAMBRIDGE PROPERTIES, LEXINGTON HOMES, L.L.C., PRENTISS PROPERTIES ACQUISITION PARTNERS, L.P., KINGSPORT DEVELOPMENT, INC., STRATEGIC REALTY ADVISORS, INC., CATELLUS DEVELOPMENT CORPORATION, PLITT THEATERS, INC. and TOYS "R" US, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED FOR REVIEW

Supreme Court Rule 14 requires that a petition for writ of certiorari shall contain "[T]he questions presented for review, expressed concisely in relation to the circumstances of the case. . . . " The question presented by the Petitioners fails to comply with the Rule in that it does not relate to the time-bar issue that was the essence of the Illinois Supreme Court decision sought to be reviewed. Petitioners themselves recognize that the issue differs from what they have set out. In discussion they state "[T]he principal issue raised by this Petition for Writ of Certiorari is whether a person's constitutional right to a refund of monies taken under an unconstitutional revenue law can be restricted by the application of a general statute of limitations period. . . . " (Petition p. 16)

A proper statement of the question will allow the Court to determine whether to grant or deny the Petition. The County therefore presents this Court with the following question:

> WHETHER THE APPLICATION OF AN ILLINOIS STATUTE OF LIMITATIONS TO A CLAIM FOR REFUND OF MONIES PAID UNDER AN ILLINOIS STATUTE AND LOCAL COUNTY ORDINANCE THAT WERE PREVIOUSLY HELD TO BE UNCONSTITUTIONAL AMOUNTS TO AN UNCONSTITUTIONAL TAKING OR VIOLATION OF FEDERAL DUE PROCESS.

PARTIES TO THE PROCEEDING

Respondents, County of Dupage, Illinois, John Lotus Novak, George Kouba and Donald Zeilenga, hereinafter referred to as "County", are the parties responding to the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Supreme Court Rule 15 states, "in addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." In compliance with this Rule, the County notes the following:

Petitioners suggest that "the government" caused a delay by the prosecution of appeals in *Northern Illinois Home Builders Assn., Inc. v. County of DuPage* (hereinafter referred to as *Northern*). (Petition p. 10) They use this suggestion as support for their argument that application of a time bar would be contrary to public policy in that it would encourage misconduct by public entities. As stated on page 6 of the Petition, without regard to the merits or relevance of that argument, the County notes that the Petitioners took the appeals in *Northern*.

Further, Petitioners omit the fact that in 1989, the class representative joined with several other commercial developers in filing a case styled *Homebuilders of Greater Chicago v. County of DuPage*. That case, although separate from the *Northern* case, similarly challenged the constitutionality of the impact fee statute and ordinances and sought a refund of fees paid. As the Illinois Supreme Court noted in its decision in this case, the *Homebuilders of Greater Chicago* suit was voluntarily dismissed by the developers in 1990. (Petitioners' Appendix p. 3) The Illinois Supreme Court also noted that the class representative, in paying fees for its developments between January 1, 1989 and July 25, 1990, submitted a separate writing

with each of its payments reciting that the payment was made under protest with a reservation of the right to make such a constitutional challenge. (Petitioners' Appendix p. 2)

Petitioners also state that the County's ordinance did not contain pre- or post-deprivation contest provisions. (Petition p. 15) In fact, there were several such provisions, and in the *Northern* case, the Illinois Supreme Court determined that "when the DuPage County ordinance is examined as a whole, it provides sufficient mechanisms whereby a fee payer may be meaningfully heard." *Northern Illinois Home Builders Assn., Inc. v. County of DuPage*, 165 Ill.2d 25, 45, 649 N.E.2d 384 (1995).

REASONS FOR DENIAL OF THE PETITION

A. PETITIONERS DID NOT PRESENT TO THE ILLINOIS SUPREME COURT THE QUESTION OF WHETHER THE ILLINOIS STATUTE OF LIMITATIONS IS REPUGNANT TO THE UNITED STATES CONSTITUTION, AND THEREFORE, THIS QUESTION IS WAIVED

Petitioners assert that jurisdiction lies under 28 U.S.C. § 1257(a). That statute provides that review may be had " . . . where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States. . . . " The County submits that Petitioners have failed to preserve the question of repugnancy because it was not squarely put to the Illinois courts. "At the minimum, however, there should be no doubt from the record

that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis in original).

Petitioners did not challenge the constitutionality of the statute of limitations in the Illinois trial court. Rather, they argued that the statute was inapplicable to an equitable claim, that accrual was later than the County contended for, and that tolling should apply. (Petition pp. 7-8) Petitioners admit that the Federal constitutional question was not raised until the case reached the Illinois Supreme Court. (Petition p. 9) Under Illinois law, the question of the constitutionality of applying the statute of limitations to a constitutional claim was waived. Issues not raised in the trial court are waived and cannot be raised for the first time on appeal. *Ragan v. Columbia Mut. Ins. Co.*, 183 Ill.2d 342, 355, 701 N.E.2d 493 (1998).

Moreover, Petitioners did not apprise the Illinois Supreme Court of the nature of their federal claim. The focus of Petitioner's Brief to the Illinois Supreme Court was on a constitutional violation occurring by reason of fees having been charged under an invalid ordinance. Petitioners sought only to have the *Northern* ruling applied to their claims. In the Petition for Leave to Appeal to the Illinois Supreme Court (Petitioners' Appendix p. 91), there was no mention of the statute of limitations. Rather, there was an assertion that an unconstitutional taking arose from the Appellate Court's decision, which Petitioners submitted had denied the effect of *Northern*. When the statute of limitations *was*

addressed by Petitioners (Petitioners' Appendix p. 92), it was not discussed in relation to the Federal Constitution, but rather was presented as a nullification of the Illinois Supreme Court's decision in *Northern*.

In their Brief to the Illinois Supreme Court, Petitioners maintained the focus on the unconstitutionality of the impact fee statute and ordinances. (Petitioners' Appendix pp. 132-135) They made cursory reference to the effect of the passage of time (Petitioners' Appendix p. 136), but returned immediately to the assertion that *Northern* "changed the law" and either created a new claim or removed an impediment to filing their claim, thereby triggering retroactivity. There was nothing in the written argument that would have notified the Illinois Supreme Court that Petitioners were challenging, under the Fifth Amendment to the United States Constitution, the constitutionality of the Illinois statute of limitations as applied to their refund claims. The asserted federal issue is not addressed in the Illinois Supreme Court decision. The issue, having been waived by Petitioners, cannot now serve as a basis for this Court to grant certiorari.

Additionally, Petitioners failed to satisfy the procedural requirements to make such an argument. Illinois court rules governing appeals provide that an Appellant's brief must include, "[I]n a case involving the construction or validity of a statute, constitutional provision, treaty, ordinance or regulation, the pertinent parts of the provision verbatim, with a citation of the place where it may be found, all under an appropriate heading, such as 'Statutes Involved'." Ill. S. Ct. R. 341(e)(5). The Illinois statute of limitations was not included in the section that

set forth the provisions relevant to the case presented to the Illinois Supreme Court. (Petitioners' Appendix pp. 126-7)

Because the issue was not fully and fairly presented below, Petitioners should not now be allowed to argue that the Illinois statute of limitations, as applied in this case, constitutes a taking or due process violation. This is especially true where in their Petition to this Court, they have again failed to identify the Illinois statute as being at issue.

B. THE DECISION OF THE ILLINOIS SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND SHOULD NOT BE REVIEWED

As a jurisdictional matter, this Petition should not be granted because it seeks review of a judgment that rests on independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). There is a plain statement in the decision below to indicate that the Illinois Supreme Court's decision was not based on federal grounds. The court stated " . . . we find the appellants' action barred by the five-year statute of limitations set forth in section 13-205 of the Code of Civil Procedure. . . . " (Petitioners' Appendix p. 34) That statement alone suffices to militate against jurisdiction here. However, should this Court deem the Illinois Court's pronouncement in this regard as insufficient, a review of the decision below will clarify that no federal question was determined by the Illinois Supreme Court.

Although Petitioners assert that a federal question was presented below (Petition pp. 10-11), the Illinois Supreme Court rested its judgment on whether the passage of time could have an effect on the right to bring a claim for refund of unconstitutional fees. The Court determined that under Illinois law, the cause of action for a refund was one at law to which the Illinois five-year statute of limitations applied, and that the cause accrued when the fees were paid. State law governs these procedural matters.

Petitioners may believe that they raised a federal "takings" claim in their reliance on *Northern*. However, that belief is misguided since *Northern* itself was a case that applied Illinois rather than federal standards. However, even if Petitioners' underlying claim *was* based on a federal question, the decision below would still be on state grounds because the *ratio decidendi* was the time bar, which, under *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), was "borrowed" from the Illinois statute of limitations. Any federal question would not be reached because it would be barred under State procedural law. This is the meaning of the hypothetical language of *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754 (1995), where the Court said:

> "But what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity – a rule containing certain procedural requirements for any refund suit – nonetheless barred the taxpayers' refund suit? (Citations omitted.) Depending on whether or not this independent rule satisfied other provisions of the Constitution, it could independently

> bar the taxpayers' refund claim. (Citation omitted.)"

The decision below was properly made on the basis of the Illinois statute of limitations irrespective of whether Petitioners' underlying refund claim was supported by state or federal law.

The Illinois Supreme Court was also urged that if a statute of limitations were applicable, the time should not have begun to run upon payment of the fees, but should have been delayed until after a change in state law was announced in *Northern Illinois Home Builders Assn., Inc. v. County of DuPage*, 165 Ill.2d 25, 649 N.E.2d 384 (1995). It was properly within the province of Illinois' highest court to say whether or not there had been a change in the "specifically and uniquely attributable" and "direct and material benefit" standard that had been part of Illinois law since the early 1960's in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961). The Illinois Supreme Court rejected the premise that its decision in *Northern* had changed the law of *Pioneer* (Petitioners' Appendix at p. 27), and it declined to find the cause accrued at a time other than payment of the fees. At the same time, it also declined, under Illinois law, to give retroactive application to *Northern*. When a matter of state law (for example, whether impact fees were constitutional under the Illinois standard of *Pioneer*) is at issue, state courts have the authority to determine whether retroactive effect will be given to their own decisions. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177 (1990). The Court noted, however, that the issue of retroactivity was not controlling where the claim

was barred on statute of limitations grounds. (Petitioners' Appendix p. 25)

If any doubt remains that the decision below was based on Illinois grounds, the doubt may be resolved by looking to how the case was presented by Petitioners themselves. In their Petition for Leave to Appeal, it was argued that review by the Illinois Supreme Court was necessary in order to consider whether the Appellate Court's ruling conflicted with two prior Illinois cases, *Ross v. City of Geneva*, 71 Ill.2d 27, 373 N.E.2d 1342 (1978) and *Bd. of Police Pension Fund v. Village of Glen Ellyn*, 337 Ill.App. 183, 85 N.E.2d 473 (1949). In its consideration of this issue, the Illinois Supreme Court decided that there was no conflict and that no relaxed time bar was mandated because the facts of this case did not present the same considerations present in the earlier cases. Again, the Illinois Supreme Court made its decision as part of Illinois law.

The nature of a claim, the time it accrues, whether there has been a change in state law that would affect accrual, and whether the Appellate decision conflicts with other Illinois decisions are all state law questions. The decision of the Illinois Supreme Court answering those questions was made on the basis of adequate and independent State grounds. The Illinois Supreme Court cited extensively to Illinois cases in determining the question of accrual for purposes of statute of limitations. (Petitioners' Appendix pp. 9-11) Admittedly, federal cases were also discussed, but they were treated as analogous and instructive rather than controlling. (Petitioners' Appendix p. 10) The Court also reviewed Illinois cases

and statutes in its analysis of *laches* as a time bar. (Petitioners' Appendix pp. 15, 17) When it cited federal cases in this regard (Petitioners' Appendix p. 16), the Illinois Court did so by way of comparison, using the phrases "[t]he federal government, like Illinois . . . " and "[l]ike section 1611(a) of the Internal Revenue Code, our own state statutes of limitations. . . . " The Illinois Supreme Court also addressed the federal cases cited by Petitioners in support of their retroactivity argument, but concluded that the argument was irrelevant. Upon reaching that conclusion, the Illinois Supreme Court stated, "The sound reasoning of the United States Supreme Court in *James Beam Distilling Co.* expresses *our* view in this refund matter." (Petitioners' Appendix p. 25) (emphasis added). Clearly, the Illinois Supreme Court did not reach its result because it felt bound by federal precedent.

Because the decision below is based on independent and adequate state grounds, this Court should not grant review.

C. PETITIONERS HAVE BEEN AFFORDED PROCEDURAL DUE PROCESS, AND THERE IS NO FACTUAL BASIS FOR A FEDERAL CLAIM

Petitioners assert, for the first time, that due process was denied because there were no pre- or post-deprivation procedures available to them. Petitioners never presented this argument to the Illinois Supreme Court, and for the reasons discussed above, the issue should not afford a basis for this Court to review the decision below.

However, even if the issue had been properly preserved, this Court should not grant review because the facts of the case do not compel a different decision than the one made by the Illinois Supreme Court.

If it were true that there were no meaningful remedies, Petitioners might be able to say under the *Reynoldsville dicta* that applying the Illinois statute of limitations did not satisfy other provisions of the Constitution. But the assertion is not wholly correct. It is true that the Highway Code contained no remedy scheme; it was a bare grant of power. However, as *Northern* shows, the County's ordinances *did* provide remedies, and those remedies were held in *Northern* to satisfy due process. *Northern Illinois Home Builders Assn. v. County of DuPage*, 165 Ill.2d 25, 45, 649 N.E.2d 384 (1995).

Moreover, in addition to having all the procedural safeguards in the ordinance, Petitioners had a post-deprivation remedy. As noted by the Illinois Supreme Court in its decision, persons paying impact fees had a legal remedy from the time they paid their fees; they were able to bring a suit for refund. (Petitioners' Appendix pp. 19-20) Illinois has, since at least 1917, recognized a cause of action for the return of fees paid under an unconstitutional law. In *Rath v. City of Chicago*, 207 Ill. App. 117 (1917), suit was filed for the recovery of occupational license fees that had been determined in another case to be unconstitutional. Plaintiff in *Rath* was allowed to recover on his timely claims, and barred on those brought beyond the applicable Illinois statute of limitations.

Petitioners were certainly aware of the procedure available to pursue their remedy. As noted in the

County's statement of facts, the class representative here, concurrently with the payment of its fees, reserved the right to bring a constitutional challenge. It then timely filed suit claiming a refund. However, for reasons best known to itself, it chose to abandon the claim before receiving its remedy. Having engaged in the process, Petitioners should not now be allowed to argue that there is no due process because there was no post-deprivation remedy available. The argument that no pre- or post-deprivation procedures were available is contradicted by Petitioners' actual experience.

Nor can Petitioners say that the post-deprivation remedy was inadequate because the procedure is constrained with time limits. The application of a statute of limitations to recovery on a constitutional claim is not a *per se* due process violation. *Stone Container Corp. v. U.S.*, 229 F.3d 1345, 1350 (Fed.Cir. 2000), citing *Block v. North Dakota*, 461 U.S. 273, 292 (1983) ("a constitutional claim can become time barred just as any other claim can"). This Court has acknowledged that a state may establish procedures for the orderly prosecution of post-deprivation claims. *McKesson Corp. v. Div. Of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 45 (1990). Petitioners have not explained to this Court, nor did they explain to the Illinois Supreme Court, exactly what is defective in the application of this particular state procedural requirement.

Due process, under both the Illinois and U.S. Constitutions, requires that one whose property is taken be given notice and a meaningful opportunity to be heard. Also included is the notion of a "clear and certain remedy". Here, the Petitioners knew they were being charged

an impact fee (notice), and they actually participated in the process of claiming a refund (opportunity). They could have received a refund (remedy) if they either had not abandoned the initial claim or if they had made a claim within five years of payment. Due process existed, but Petitioners did not avail themselves of it.

D. PETITIONERS HAVE BEEN AFFORDED SUBSTANTIVE DUE PROCESS

In *Northern,* the Illinois Supreme Court declared that the County's initial impact fee ordinances were invalid because there was no guarantee that the funds collected would be used in such a way as to satisfy the "direct and material benefit" test of *Pioneer.* In this case, an uncontroverted affidavit was presented in response to a motion for summary judgment. The affidavit established that the hypothetical concerns voiced in *Northern* had not been realized, and that the fees in this case had actually been spent for Petitioners' benefit. This provision of a tangible return for the money paid would satisfy any need for a post-deprivation remedy. It would also meet the conditions necessary to avoid an unlawful taking.

There is nothing fundamentally unfair about the County retaining funds to cover a portion of the cost of road improvements constructed for the Petitioners, but Petitioners will be unjustly enriched if they are allowed to retain the benefits provided by the County. Petitioners have not, and on the facts of this case cannot, set out a case for relief, much less for review of the decision below.

CONCLUSION

Petitioners have not met the jurisdictional requirements for review by writ of certiorari. Their argument that a statute of limitations cannot be applied to a constitutional claim is incorrect, and more importantly, it is waived. The decision they object to is one of purely Illinois law, and should not be reviewed. Finally, there is no federal due process issue on the facts of the case. Wherefore, the Respondents request that the petition for writ of certiorari be denied.

Dated this 6th day of August, 2001.

Respectfully submitted,

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